ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

MONDAY, AUGUST 25, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to the call of the chairman, in the room of the Committee on Appropriations in the Capitol, at 10 o'clock a. m., Senator Irvine L. Lenroot presiding.

Present: Senators Lenroot (acting chairman) and Chamberlain.

Senator LENROOT. Will you proceed now, Gen. Ansell, and make such statement as you desire?

STATEMENT OF MR. SAMUEL T. ANSELL, FORMERLY BRIGADIER GENERAL AND ACTING JUDGE ADVOCATE GENERAL, UNITED STATES ARMY.

Mr. ANSELL. Mr. Chairman and gentlemen, the subject of military justice is one in which I think every Army officer ought to be specially interested, and the people themselves generally interested.

I, myself, have been specially interested in this subject since my cadet days. The system of military justice that is ours, it has always appeared to me, does not fit the kind of army with which we must fight the battles of this country; that is, an army that is not composed of professional soldiers entirely—a standing army—but an army that is created for the emergency out of our citizenship.

The old idea has been that a court-martial, which is the agency for executing the disciplinary law of the Army, is a rough and ready tribunal, and must necessarily be so; that it is not a court at all; that it is an agency of a military commander to investigate facts and recommend what disciplinary action ought to be taken; that it is a body responding purely to the exigencies of a military situation; not a normal thing, not governed by principles of law at all.

That was, as I shall show later on, the old continental idea, and it was the theory of the system, was indeed the system, which we ourselves adopted, rather witlessly, when we established this Government.

I think it is by reason of this that courts-martial, as we understand them, have really never had the confidence of our people. They, as a rule, have been sneered at by the legal profession, and it has been pointed out by great lawyers, beginning with Blackstone, that they were not to be regarded as courts at all; that the law gov-

erning them was not law at all, in any proper sense, and that they were not to be relied upon as legal tribunals.

Throughout my experience in the Army I have observed, too frequently, that courts-martial in our system——

Senator LENROOT. Might I suggest that at this point it might be well for you to state when you graduated from West Point, and what your experience has been.

Mr. ANSELL. I graduated from West Point in 1899, was immediately thereafter assigned to the Eleventh Infantry as a line officer, served first in Porto Rico and then went to the Philippines in 1900, and stayed there—serving part of the time with the civil government—until the insurrection was over. In 1902 I left the Philippines and went to West Point as an instructor in law, and remained there on such duty until 1904, when I applied again to rejoin my regiment, stationed at Fort Russell. I served with my regiment then until 1906, when I was again assigned to West Point as instructor in law.

I remained at West Point until 1909, when I was ordered to the Philippines, and while there was detached for duty with the civil government, at the same time, however, performing the duties of judge-advocate of the Province of Mindanao, which was under the command of Gen. Pershing.

I returned from the Philippines in 1911 and was assistant judge advocate of the Department of the East until 1912—for a year—and was then ordered to duty in the office of the Judge Advocate General, in 1912, where I have been ever since.

My duties in the office of the Judge Advocate General were, until the beginning of this war, those of legal adviser to the civil jurisdiction of the War Department, including control of the rivers and harbors and reservations—such other civil matters as come under the War Department jurisdiction.

I was also, by special assignment, counsel for the governments of Porto Rico and of the Philippines before the courts of the United States.

My line service, then, includes a service with the Infantry of something less than five years, and something less than two years of that time was in active service in the field in the Philippine Islands. The rest of my service has been in the law department of the Army and on special assignment as counsel for the insular governments.

Senator LENROOT. When did you resign?

Mr. ANSELL. I resigned on the 21st of July last.

Shortly after the war broke out, by virtue of being the senior officer in the department, I became the head of the Judge Advocate General's Department during the absence of Gen. Crowder, when he was performing the duties of Provost Marshal General.

In October of 1917 I was appointed brigadier general and Judge Advocate, and retained as Acting Judge Advocate General while the Judge Advocate General himself was performing the duties of the Provost Marshal General.

During the greater part of the war I was Acting Judge Advocate General, in the sense that I was senior officer on duty in that department. That does not mean that I was responsible for the policies of the office, since a man succeeding by mere virtue of seniority

can not be. In order to be responsible for the policies of the office a man must be assigned under section 1132 of the Revised Statutes as acting chief of bureau.

With no other purpose than that of responding to the chairman's question, I mention the fact that while in the latter days of 1917 an order was published, reciting that it was by direction of the President, appointing me Acting Judge Advocate General of the Army, that order was revoked. I was not in charge of the policies of the office. I made no appointments to the office during the war.

Senator LENROOT. You said, General, that order was revoked? Did I understand you correctly?

Mr. ANSELL. Yes, sir.

Senator LENROOT. How long after the order was published?

Mr. ANSELL. I think the order was never published in printed form. It was delivered to me in the usual typewritten form, properly authenticated, and I should say within a week after it was delivered to me it was revoked or suppressed or otherwise made ineffectual.

I think that we might as well understand right here—and I say this in no spirit of criticism, but as a fact—that my views with respect to the administration of military justice were not concurred in by those bureau chiefs of the War Department who have most to do with the government and regulation of the exercise of military command. My views were not concurred in, speaking more specifically, by the then Acting Chief of Staff, and by the Inspector General of the Army, and though at first they were, later they were not concurred in by the Judge Advocate General himself. I think it is in point to state right here that the first great difference of view between me and the War Department—by which term I mean those bureaus the chiefs of which I have just mentioned, with whom the Secretary of War himself finally concurred—came about shortly after I had assumed charge of the office.

There came to the office, which at that time consisted of myself and 14 civil lawyers and one retired officer of the Army, a case from the Department of Texas, which has become something of a cause celebre respecting military justice during the war. That case was a case of about a dozen noncommissioned officers of the Army who had been tried upon the charge of mutiny. It was perfectly obvious to all of us that the men ought not to have been tried at all, and that such trial as they had was illegal in many respects. The charge itself was imperfect as a matter of law; the defense made for them was not such defense as ought to have been made for them, and the counsel that they had did not give them that full assistance which ought to have been given them. Their rights were generally disregarded during the trial, and their right to make defense and to make the proper inquiry into the sufficiency of the charge and the proceeding. They had been court-martialed upon charges that had been preferred by a young West Point officer who was not an experienced man, who ought not to have preferred the charges at all, whose conduct itself was lawless and arbitrary and wrong, and who, in my judgment, ought to have been court-martialed himself for his part in this affair.

But this case went through the entire proceeding, from the bottom to the top of the military hierarchy—the top of the hierarchy

being a major general in command of the department—without the discovery or detection of any of these errors; or if they were discovered they were ignored; with the result that this trial, which was wrong in its inception, and in which the legal rights of the accused were at no point protected, resulted in the dismissal of these old noncommissioned officers of the Army from the Army of the United States, in disgrace, and in their being sentenced to long terms of confinement in the penitentiary for this most heinous, perhaps, of all military offenses, mutiny.

Senator CHAMBERLAIN. General, pardon me; I am not familiar with the case, of course; but you are making a record here. As a matter of fact, these men were tried for mutiny because they had refused to obey an order?

Mr. ANSELL. Yes, sir.

Senator CHAMBERLAIN. Will you just put in the record the facts out of which this charge of mutiny grew?

Mr. ANSELL. The origin, as I remember it—I must be fairly familiar with it, having gone over it so many times, but I am speaking from memory—was this:

These noncommissioned officers, and perhaps other men of the batteries, were engaged in some mild form of gambling in the company street—perhaps the shooting of craps or some such game. This, of course, is in violation of the standing orders of camps of the Army generally. It ought to be stated, however, that as a human fact it is one of those things which, when unaccompanied by disorder, a man used to the handling of men closes his eyes to or otherwise gets rid of without the application of harsh disciplinary measures. However, this young officer put these noncommissioned officers in arrest in quarters for their participation in this mild gambling. It is according to long-standing orders of the War Department that a noncommissioned officer when placed in arrest in quarters performs no duty. In that respect he is like an officer. He is deprived of all his official powers and functions during the period of that status.

This young officer, however, the next morning, observing that these noncommissioned officers were not present at the early drill formation, made inquiry, and they said to him that having been put in arrest they felt obliged respectfully to say to him—and they did respectfully say to him—that as long as they were in arrest they could not go to drill, for the obvious reason that in accordance with the orders of the War Department they could exercise none of their functions as noncommissioned officers. Notwithstanding this obvious truth, and notwithstanding the very proper and respectful demeanor of the men when they asserted their right under this standing order of the department, the young officer ordered them to drill; and again they said that if they should go to drill they ought to be released from arrest. There was no concerted action. It was a thing well understood, however by all noncommissioned officers and doubtless the voices of the few who spoke were the voices of them all.

After the young officer threatened them with charges of mutiny, told them that charges of mutiny would be preferred because of the fact that all were disobeying, as he called it, his orders, he marched them off to the guard house and put them in close confinement, charged with mutiny. Of course, mutiny must be a concerted action

on the part of those under military authority, concerted lawless action, with an intent to subvert and assume military authority. That is what they were charged with, mutiny, and that is what they were tried and punished for.

Now, when that case got to the department, it was perfectly patent not only that this state of affairs—the facts—did not sustain the charge of mutiny at any point, but that the charge itself was improperly drafted in that it did not set out all the essential elements of the mutiny, and, furthermore, that during the progress of the trial the substantial rights of the men themselves at many points were not protected, so that everybody conceded that without applying meticulous tests to the legality of this proceeding, it ought not, if it could be tested by law, to stand.

Senator LENROOT. May I ask you there, was the verdict of the court-martial approved by the commanding officer?

Mr. ANSELL. Yes, sir.

Senator LENROOT. Did it go from there direct to your office?

Mr. ANSELL. Yes, sir.

Senator LENROOT. Did the record affirmatively show that at the time of the action complained of the noncommissioned officers were under arrest?

Mr. ANSELL. Yes, sir.

Senator LENROOT. That appeared on the face of the record?

Mr. ANSELL. Yes, sir; the facts I have given here.

Senator LENROOT. That appeared upon the record of the court-martial?

Mr. ANSELL. Yes, sir. This was at the beginning of the war, and we knew, of course—expected—that there would be many like cases; and that brought us face to face with the fact that under the practice of the War Department, as suggested at that time, although the proceedings might contain errors of law that at least measured up to reversible error if not annihilating error, it was the practice of the War Department to say, and to act accordingly, that notwithstanding such error it was not reviewable and was therefore incurable. In other words, the War Department at that time held that the proceedings, findings, and judgment of a court-martial are final beyond all remedial, curative power, when those proceedings and judgment are once approved by the commanding general who brought that court into being, regardless of whatever errors of law were committed in the proceedings; and that, conceding that the record was full of such errors, it could not be examined.

Senator LENROOT. That is to say, that the only power of higher authorities and officials would be in the exercise of clemency?

Mr. ANSELL. Yes; that there was no way of modifying the judgment, whatever. It was beyond all review regardless of its conceded illegality.

Senator CHAMBERLAIN. Do not leave that open in the record to misunderstanding. You do not mean that that power existed in the Judge Advocate General, when you speak of the power to exercise clemency?

Senator LENROOT. No; I meant if exercised by the President.

Mr. ANSELL. The Judge Advocate General's office has been in such cases limited to the power of exercising clemency in an advisory way.

Senator CHAMBERLAIN. Yes.

Mr. ANSELL. So, that the situation at the beginning of the war was—and it is still largely the situation—that a court-martial judgment can not be modified by any power on earth no matter what prejudicial errors of law were committed in the proceeding. It is around that proposition that the whole controversy—if we can refer to it as a controversy, and I presume we may—revolves. I contend, in short, that a court-martial is a court; that it is a court created by Congress under its power to make rules and regulations for the government of the Army; that it is just as much of a court, though not a part, evidently, of the Federal judiciary, as the courts of the District of Columbia are courts; that it is there to apply the law of Congress passed in this regard; that there is to be a trial, and that the law contemplates a fair trial, with all that that term means; that the court being a court, it is to be governed by law from beginning to end; and that if it commits errors of law there ought to be some method of correcting those errors if prejudicial, and modifying the judgment accordingly.

We sought, all of us, and independently, regarding it as a most important matter, at the beginning of this great war, because obviously all powers affecting courts-martial are powers conferred by Congress itself, to discover some statutory authority for modifying judgments of courts-martial in cases of this sort, where, if they could be tested by law, they were concededly illegal.

Several of the officers of the department came at once upon that section of the Revised Statutes of the United States, section 1199, which provides that all proceedings of courts-martial shall be received in the office of the Judge Advocate General, and by him be revised.

In the pursuit of that study, various memoranda were written by various officers, various conferences were held, and finally, without a single dissent, the officers on duty with that office agreed that within this statute was to be found the power to revise the judgments of courts-martial. At that time the Judge Advocate General was not on duty in the office, but he agreed with me that the power was advisable, that it ought to be located there; that it ought to exist; and he expressed his concurrence with my efforts to deduce it out of that statute. Later on, he changed his mind.

Senator LENROOT. Have you rendered a written opinion that he concurred in?

Mr. ANSELL. Yes; that opinion is in the record of the hearings upon your bill—the Chamberlain bill—Senator Chamberlain, of the last session of the last Congress. Whether you wish it put in the record of these hearings or not, I do not know, Mr. Chairman.

Senator CHAMBERLAIN. What do you think about it, Senator Lenroot, that it ought to be printed or not?

Senator LENROOT. You are more familiar with how material that is going to be to your issue, and I will accept your suggestion, whatever it is, about that.

Senator CHAMBERLAIN. I think probably it ought to go in.

Senator LENROOT. Very well.

Mr. ANSELL. Then I ask permission to insert at this point the office opinion in the mutiny case above referred to—the office opinion

in support of the action taken in that case; and I think, in fairness, the counter opinion of the Judge Advocate General and the ruling of the Secretary of War ought to be included at this point, also.

Senator CHAMBERLAIN. Very well.

Senator LENROOT. Yes.

(The documents referred to and the ruling of the Secretary of War are here printed in full as follows:)

ANSELL EXHIBIT A.

OFFICE OPINION OF BRIG. GEN. S. T. ANSELL, ACTING JUDGE ADVOCATE GENERAL: RE REVISORY POWER OVER COURTS-MARTIAL PROCEEDINGS AND SENTENCES.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, D. C., November 10, 1917.

Memorandum for the Secretary of War
(For his personal consideration).

Subject: Authority vested in the Judge Advocate General of the Army by section 1199, Revised Statutes, to "receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

1. It is my duty to bring to your attention and present to you my views upon a long-existing situation which arose out of an ill-considered and erroneous change of attitude upon the part of this office that occurred within a score of years after the close of the Civil War—a situation which has endured ever since in the face of the law and in spite of attending difficulties but without reexamination, and which has profoundly affected the administration of military justice in our Army. I refer to the practice of this office, adopted it seems in the early eighties, to the effect that errors of law, appearing on the record, occurring in the procedure of courts-martial having jurisdiction however grave and prejudicial such errors may be, are absolutely beyond all power of review. This nonuser of power which Congress authorized and required this office to exercise, has, in numberless instances of court-martial of members of our Military Establishment, resulted in a denial of simple justice guaranteed them by law. Under the rule, concededly illegal and unjust court-martial sentences, when once approved and ordered executed by the authorities below, pass beyond all corrective power here and can never be remedied in the slightest degree or modified, except by an exercise of Executive clemency—an utterly inadequate remedy, in that it must proceed upon the predicate of legality, can operate only on unexecuted punishment, and, besides, has no restorative powers.

2. The last and most flagrant case of the many recent ones which have moved me to exercise an authority of this office which has long lain dormant, perhaps denied, in respect of which I address you this memorandum, was the recent case of the trial and conviction for mutiny of 12 or 15 noncommissioned officers of Battery A of the Eighteenth Field Artillery, resulting in sentencing them to dishonorable discharge and long terms of imprisonment. Those men did not commit mutiny. They were driven into the situation which served as the basis of the charge by the unwarranted and capricious conduct of a young officer commanding the battery who had been out of the Military Academy but two years. Notwithstanding the offense was not at all made out by the evidence of record, notwithstanding the oppressive and tyrannical conduct of the battery commander, notwithstanding the unfair and unjust attitude of the judge advocate, which also appeared on the record, these noncommissioned officers were expelled from the Army in dishonor and sentenced to terms of imprisonment ranging from seven to three years. The court had jurisdiction, and its judgment and sentence for that reason could not be pronounced null and void, but its conduct of the trial involved the commission of many errors of law which appeared upon the face of the record and justified, upon revision, a reversal of that judgment. That case showed the extreme and urgent necessity of a reexamination of my powers in such cases, and, after thorough consideration and with the concurrence of all my office associates, I took action in that case and concluded my review as follows:

"In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants and recommend that the necessary orders be issued restoring each of them to duty."

Since this involves a departure from long-established peace-time administration of this office, I deem it my duty to acquaint you with the reasons therefor.

3. You, Mr. Secretary, and your immediate military advisers, can never appreciate, I think, the full extent of the injustice that has been done our men through the operation of this rule. Officers of our Army, howsoever sympathetic, can not approach a proper appreciation of the depth, extent, and generality of the injustice done, unless, through service in this office, they have seen the thing in the aggregate. A proper sense of the injustice can be felt only by those who exercise immediately the authority of this office. Indeed, those thus experienced can gather the full impression of the wrong done only by a complete mental inclusion of that vast number of cases where concededly corrective power ought to have been, but was not, exercised in each year of the past forty-odd years. My entire service, during all of which I have been keenly sensible and morally certain that the office practice was wrong, my six years' service in this office during which I have borne witness to hundreds of instances of conceded and uncorrected injustice—all of this has never served to impress me with the full sense of the wrong done to the individual and to the service so much as has the experience of my present brief incumbency of this office during this war. What is true in my case is true, so they advise me, of my associates. During the past three months, in scores, if not hundreds of cases carrying sentence of dishonorable expulsion from the Army with the usual imprisonment, this office has emphatically remarked the most prejudicial error of law in the proceedings leading to the judgment of conviction, but impelled by the long-established practice has been able to do no more than point out the error and recommend Executive clemency. All this, of course, has been utterly inadequate. It has not righted the wrong. It has not made amends to the injured man. It has not restored him, and could not restore him, to his honorable position in the service. It could do no more than grant pardon for any portion of the sentence not yet executed. Such a situation commands me to say, with all the emphasis in my power, that it must be changed and changed without delay. This office must go back to the law as it stands so clearly written, and, in the interest of right and justice, exercise that authority which the law of Congress has commanded it to exercise.

4. The Judge Advocate General of the Army is to revise all courts-martial proceedings for prejudicial error and correct the same. The law as it exists to-day is to be found in section 1199, Revised Statutes, wherein it is provided that—

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

The word "revise," whether used in its legal or ordinary sense, for both are the same, can have but one meaning. It signifies an examination of the record for errors of law upon the face of the record and the correction of such errors as may be found. "Revise," or its exact synonym "review," is a word so frequently found in the law and so familiar to all lawyers that its meaning can never be mistaken. When used in connection with judicial proceedings it can involve no ambiguity. I am justified in entering upon a construction of the word only by the fact that this office for so long a time has ignored its meaning.

The word "revise" by the Standard Dictionary is defined thus:

"To go or look or examine for correction or errors, or for the purpose of suggesting or making amendments, additions, or changes; reexamine; review. Hence, to change or correct anything as for the better or by authority; alter or reform."

And the word "review" given therein as a synonym for "revise," is defined as—

"To go over and examine again; to consider or examine again (as something done or adjudged by a lower court) with a view to passing upon its legality or correctness; reconsider with a view to correction; as, the court of appeals reviewed the judgment; the judge reviewed and retaxed the bill of costs; to see or look over again; a literal meaning now rare."

In 34 Cys., at page 1723, the word "revise" is defined as—

"To review or reexamine for corrections; to review, or alter or amend. See also 'revision.'"

And the word "revision" is therein defined as—

"The act of reexamination to correct, review, alter or amend."

And in Black's Law Dictionary, "revise" is defined as—

"To review, to reexamine for correction; to go over a thing for the purpose of amending, correcting, rearranging or otherwise improving it."

And "review" is therein defined as—

"A reconsideration; second view or examination; revision; consideration for purpose of correction. Used especially of the examination of a cause by an appellate court."

And the word "revision" is therein defined as—

"To reexamine and amend; as, to revise a judgment, a code, laws, statutes, reports, accounts. Compare 'review.'"

And the word "review" is defined in the same dictionary as—

"viewing again; a second consideration; revisement, reconsideration, reexamination to correct, if necessary, a previous examination."

And in the same dictionary a "court of review" is defined to mean—

"A court whose distinctive function is to pass upon (confirming or reversing) the final decisions of another or other courts."

And in "Words and Pharses" (vol. 7) the word "revise" is defined as follows:

"To revise is to review or reexamine for correction, and when applied to a statute contemplates the reexamination of the same subject-matter contained in a prior statute and the substitution of a new and what is believed to be a still more perfect rule." Citing Casey *v.* Harned, 5 Iowa (5 Clark) 1, 12.

"Revise as contained in the Constitution, Article XV, section 11, providing that 'three persons learned in the law shall be appointed to revise and rearrange the statute laws of the State,' means to review, alter, and amend, and does not signify an act of absolute origination. It relates to something already in existence." Citing Visart *v.* Knoppa, 27 Ark., 266–272.

"A law is revised when it is in whole or in part permitted to remain and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect or to fit it better to accomplish the object or purpose for which it was made, or some other object or purpose." Citing Falconer *v.* Robinson, 46 Ala., 340, 348.

5. I find the word used in another Federal statute in quite an analogous way. Section 24 of the act of July 1, 1898, chapter 541, 30 Stat. 553 (bankruptcy law) provides in part as follows:

"The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within that jurisdiction."

The word "revise" as used in the bankruptcy act is universally held to be something broader than the power to review by writ of error. In In re Cole, 163 Fed. 180, 181 (C. C. A., first circuit), a case typical of all, the court, after adverting to the usual limitations upon the power to review by way of writ of error, contrasted that method with the statutory power to revise, as conferred by that act, saying:

"On a petition to revise like that before us we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the district court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the issues which that court considered."

And the court then said:

"We feel safe to adopt the broader view, and it is our present opinion that it is our right so to do—"

And concluded that, upon revision—

"We can revise any question of law as to which we may justly infer that the district court reached a conclusion, whether formally expressed or not and whether or not formally presented."

The language of that statute is the very language of this except that the revision there is expressly limited to matters of law. Inasmuch as in the statute before us there is no such express limitation, it could hardly be held that the revisory power of this office is less than the revisory power conferred by the bankruptcy act. The word "revise" as used in the bankruptcy statute has always been held to signify power to reexamine all matters of law imported

by or into the proceedings of the case, and a very liberal view has been taken of what constitutes the record and proceedings in such matters. (See the many cases cited in Federal Reporter Digest. "Bankruptcy," vol. 5, from secs. 349 to 448.) The revisory power there conferred is something broader than that invoked by writ of error, though, of course, not so broad as to justify a reexamination of mere controversies or questions of fact. Doubtless, in any view of the case, the question whether the evidence sustains the verdict, that is, whether there is any substantial evidence at all upon which the verdict may rest, is a question of law which may be reviewed under this power, and such at least must be the power of this office.

6. The history of the legislation, the early execution given it, its historic place in the body of the law of which it is a part, all clearly show that this must be the meaning assigned to the word "revise" in the present instance. It is not necessary now to say whether such revisory power existed in the judge advocate in the early days of our Army, though, especially in view of the English military law, this seems to have been so; nor to advert to the fact that after the War of 1812, and also after the Mexican War, the duty of the Corps of Judge Advocates seems to have been primarily that of military prosecutors.

Nor is it necessary, except to indicate the proper setting, to say that military prosecution had ceased to be the primary function of the Corps of Judge Advocates at the beginning of the Civil War, if not before. Nor is it more than suggestive that the Judge Advocate General of the Army has always presided over both the Corps of Judge Advocates and the Bureau of Military Justice, and that this corps and this bureau were consolidated by the act of 1884 (23 Stats., 113) into what is now the Judge Advocate General's Department. It is important to note that Congress established the Bureau of Military Justice in the light of the necessities of the Civil War and expressly invested its head, the Judge Advocate General of the Army, with this revisory power; and it is important to note that Congress redeclared this power in 1864 (13 Stats., 145), and in 1866 (14 Stats., 334), and again in section 1199, Revised Statutes, of which the former acts were the antecedents. Now, taking up these antecedents: In the act of July 17, 1862 (12 Stats., 598), which was an act "calling forth the militia to execute the laws of the Union, to suppress insurrection, etc.," it was provided—

"That the President shall appoint, by and with the advice and consent of the Senate, a Judge Advocate General, with the rank, pay, and emoluments of a colonel of Cavalry, to whose office shall be returned, for revision, all records, and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

This provision speaks very plainly. It not only directs the Judge Advocate General to revise the records and proceedings of courts-martial, but it further directs that officer to keep a record of "all proceedings had thereupon"; that is, upon the revision. It is clear that this intended something more than a perfunctory scrutiny of such records, and that it in fact vested this office with power to make any correction of errors of law found to be necessary in the administration of justice. The records of this office indicate that Judge Holt, the Judge Advocate General of the Army during the Civil War period, did revise proceedings in the sense here indicated.

The next legislative expression is found in the act of June 20, 1864 (13 Stats. 145), of which sections 5 and 6 are as follows:

"SEC. 5. There shall be attached to, and made a part of, the War Department, during the continuance of the present Rebellion, a bureau to be known as the Bureau of Military Justice, to which shall be returned for revision the records and proceedings of all the courts-martial, courts of inquiry, and military commissions of the Armies of the United States, and in which a record shall be kept of all proceedings had thereupon."

"SEC. 6. That the President shall appoint, by and with the advice and consent of the Senate, as the head of said bureau, a Judge Advocate General, with the rank, pay, and allowances of a brigadier general, and an Assistant Judge Advocate General, with the rank, pay, and allowances of a colonel of Cavalry. And the said Judge Advocate General and his assistant shall receive, revise, and have recorded all proceedings of courts-martial, courts of inquiry, and military commissions of the Armies of the United States, and perform such other duties as have heretofore been performed by the Judge Advocate General of the Armies of the United States."

Just as the title of the judge advocate is in itself significant in this connection, so is the title of the bureau thus created—the Bureau of Military Justice. It will be noticed that this act reserves all the requirements of the act of July 17, 1862, supra, concerning the duty of the Judge Advocate General in the matter of revising the records of general courts-martial, and keeping a record of "all proceedings had thereupon," meaning, of course, proceedings upon such records in revision. And at the close of the war, in the legislation looking to the peace establishment, Congress enacted the act of July 28, 1866 (14 Stat. 334), the same being "An act to increase and fix the military peace establishment of the United States," in section 12 whereof it was provided—

"That the Bureau of Military Justice shall hereafter consist of one Judge Advocate General, with the rank, pay, and emoluments of a brigadier general, and one Assistant Judge Advocate General, with the rank, pay, and emoluments of a colonel of Cavalry; and the said Judge Advocate General shall receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and shall perform such other duties as have been heretofore performed by the Judge Advocate General of the Army * * *." This act does not change the duties of the Judge Advocate General with reference to the revision of records of courts-martial. It omits the phrase found in the two acts immediately preceding to the effect that "a record shall be kept of all proceedings had thereupon," but introduces for the first time the direction that in addition to revising and recording the proceedings of all courts-martial, the Judge Advocate shall "perform such other duties as have been performed heretofore by the Judge Advocate General of the Army." It will be observed that this last cited expression, as carried into section 1199 of the Revised Statutes as quoted above, still remains the law on the subject. In referring to the duties "heretofore performed by the Judge Advocate General of the Army," the statute included, inter alia, the duties prescribed by the statute, for the presumption is that the duties thus prescribed were in fact performed. It follows that included within this direction is the mandate that a record be kept of all proceedings had in the revision of courts-martial proceedings in the office of the Judge Advocate General, and the force of this mandate must be added to the ordinary meaning of the word "revise" in determining the scope of the duties of the Judge Advocate General as now defined by law.

7. The legislative history of all the antecedent acts, brought forward as 1199, R. S., shows that the word "revise" has the meaning here indicated. As to the act of 1862, see Congressional Globe, part 4, second session Seventeenth Congress, pages 3320, 3321. This was especially true of the debates upon the act of 1866, of which there was considerable owing to the objection taken to the legislative recognition contained in that bill of military commissions. An effort was made to strke out, and otherwise defeat, the entire provision for the Bureau of Military Justice during peace, and the strongest argument made in support of its retention was found in the fact that it had, and had freely and satisfactorily exercised this revisory power. The whole tenor of the debate clearly shows what Congress understood had been the revisory power of the Judge Advocate General of the Army since the act of 1862. It was said by one Senator (Mr. Lane of Indiana)—

"It is utterly impossible for the President in the multiplicity of his duties to look into all these cases; it is physically impossible for the Secretary of War to do so; and to facilitate the administration of criminal justice, it was found necessary to establish this bureau."

And another Senator (Mr. Hendricks) said:

"I am not prepared to vote to abolish the court of military justice. If that court be properly constituted and discharges its duties legitimately within its jurisdiction as the court was organized under the act of two or three years ago, it will be a blessing, and I will not vote to abolish the court because of such wrong decisions that it may have made."

And further on the same Senator referred to the case of one officer in whom he was interested in which there had been an erroneous conviction, and said in that connection—

"I went with him to see the Judge Advocate General. The case was called up before the Judge Advocate General and reviewed, and at once he decided that the testimony was not sufficient, and restored the young man to his position in the Army."

Further on, referring to this power, the same Senator said:

"I think it is a protection to the military men of the country to have such a court. It will come to be, when the hour of passion, to which my colleague

has referred, shall have passed away, a court deliberate in its proceedings and, I hope, and have no doubt, wise in its adjudication. Then it will be a blessing to the country and a protection to our military men. Necessarily, when our Army shall come to be 50,000 strong, there will be many military trials for military offenses of military men. There ought to be a court of appeal; and this is intended to be a court of appeal; a court in which the judge of the courts-martial may be reviewed, and, if improper, revised. Such a court seems to me ought to be in the Army."

(See Cong. Globe, p. 4, 39th Cong., 1st sess., 1866, pp. 3672–3676, et passim.)

It was these legislative antecedents that were brought forward, without substantial change of language, as the existing law (sec. 1199, Rev. Stats.) now under discussion.

8. This office, while ignoring its right and duty to revise for prejudicial other than jurisdictional error, has with strange inconsistency been quick to assert its power to declare a judgment and sentence null and void on the ground that the proceedings were, in its judgment, coram non judice. After the large armies of the Civil War had been demobilized and their activities were no longer a matter of immediate concern to this department, and the Army had become, in point of size, but a small national police force, this office, for reasons unexpressed and unknown, restricted itself to the correction of such jurisdictional error alone. The practice seems to have been adopted without thoughtful consideration of the law or policy involved or the resulting injustice. The opinions of this office, beginning with the early eighties, assume, without argument or reason, that the office was so limited. It can not fairly be said that upon this specific question the office has ever fairly and thoughtfully expressed itself. Extracts from two of the opinions, typical of all, will be sufficient to show the general character and nature of these holdings.

In an opinion under date of August 10, 1885, approved by the Secretary of War, the Acting Judge Advocate Gen. Lieber held as follows:

"As the whole matter is understood to be recommitted to this office for examination, including the letter referred to, I beg to remark that in acting upon the sentence of a court-martial, the reviewing authority acts partly in a judicial and partly in a ministerial capacity. He 'decides' and 'orders' (Army Regs. par. 918). Without his decision the sentence is incomplete. His decision is an exercise of judicial functions, and is as much beyond the control of other constituted authority as the findings of the court are beyond his. He can not be ordered to revoke it, and, if it be adhered to, the sentence can be removed in no other way than by the President in the exercise of his pardoning power (or set aside by the President when void by reason of a want of jurisdiction)."

In the case of Lieut. J. N. Glass, tried by general court-martial, this office in a review under date of July 20, 1886, signed by Acting Judge Advocate Gen. Lieber, concluded as follows:

"The proceedings, findings, and sentence in this case having been approved by the reviewing officer in the exercise of his proper functions, they are beyond any power of revision on the part of higher authority, but the President by the virtue of his pardoning power may remit the unexecuted part of the sentence. The latter course is respectfully recommended by this office."

In the opinion first above cited, which is a fair sample of the many that have followed, the then Acting Judge Advocate General took the view that the proceedings of a general court-martial could be set aside for a want of jurisdiction. But whence came that power? In declaring it to be competent to declare the proceedings of a general court-martial void for want of jurisdiction he evidently overlooked the fact that in declaring a trial void for want of jurisdiction some functionary must sit in an appellate capacity, for which there must be some statutory or common-law authority. As a matter of fact, no statutory or other authority can be found for the exercise of the power to declare a trial for want of jurisdiction unless it can be found in that provision of section 1199, which confers a general revisory power upon the Judge Advocate General. If the power to revise includes the power to declare proceedings void for want of jurisdiction it must also by any fair construction include the power to declare a judgment wrong as a matter of law and reverse it. If this office has the one power it necessarily has the other, and if it has not the latter power it has not the former. By the plain language of the statute this office has both.

9. Nor has the power here contended for ever been questioned by the civil courts or other civil authority. To be sure, there are many expressions in adjudicated cases to the effect that the duly appoved sentence of a court-martial when the court has proceeded within its jurisdiction and the rules governing its

procedure is as final and unassailable as a decision of a civil court of last resort. But is must be remembered, of course, that in each of these cases the court was speaking of collateral attack in the civil courts on the proceedings of a court-martial and did not have in view the power of the department itself to correct court-martial judgment by way of direct revision of it. I have also examined many expressions of opinion by the Attorney General and find that these expressions have had to do generally with cases in which the final approval has been by the President himself and go only to the question of whether such cases can be reopened by the President or his successor for the purpose of undoing what he has once legally done. I have not found that any authority has ever questioned the revisory power of this office to correct errors in law in court-martial procedure when they amount to a denial of justice. And I may be permitted to say that should I find such holdings by any authority other than the highest court of the land, I should not hesitate to question the soundness of the decision.

In this connection, I may say that it was suggested to me by the present Judge Advocate General himself that the finality attributed by the Articles of War to the power of the several reviewing authorities might be thought to militate against or negative the view I advance. This could hardly be true. The statutory power of the Judge Advocate General of the Army conferred by 1199 Revised Statutes stands unaffected by anything said in the law as to the power of appointing authorities. Indeed, the statutes are not in pari materia. They exist for entirely different purposes. They establish different functions, all of which have independent spheres. The general powers of correction conferred upon appointing authorities of the Articles of War existed prior to the enactment of the statutes now brought forward in 1199 Revised Statutes and also concurrently with them, without thought of conflict. There is, of course, a field of operation for each. The concept of finality referred to is the finality within the system, the finality with which all lawyers are familiar, and which must exist in order that there may be a review at all. A judgment of an inferior court must be a final judgment before it can be subjected to review in an appellate court. The action of the appointing or confirming authority directly giving effect to the judgment of the court itself gives finality to that judgment, that is, that completeness and integrity without which there could be nothing for this or any other authority to review. Such judgments are operative as final until and unless revised upon review. This concept of finality is so familiar to lawyers as to require no further discussion.

10. Such is the law, and there is a pressing necessity at this time that we go back to it, revive it, and act under it. Daily this office reviews records which show that in the trial some substantial rights of persons standing before courts-martial accused of crime have been flagrantly violated or that convictions have been secured on wholly insufficient evidence. Others show that charges and specifications are sometimes laid under the ninety-sixth (the general) article of war for acts that are not properly to be regarded as military offenses at all. And quite frequently cases are encountered in which men have been convicted of serious offenses where upon the evidence the offense committed was not the offense charged or for which they were tried. Officers of the Army, even of the Regular Army, are persons unlearned in the law, and, as fallible beings, may be expected from time to time to commit such errors in court-martial procedure as operate to deny the accused right and justice and result in his unlawful punishment. And such errors are even more to be expected now, as our Army is expanding and thousands of new officers are brought into the service who have had no military training and no familiarity with military law and the customs of the service. For this reason alone there should be the closest supervision.

But the situation may also be viewed from another aspect. As an American institution our Army must be maintained under law. Our Army can never be the most successful Army it is capable of becoming except it have the highest regard for the rights of the enlisted men, as those rights are established by law. Indeed, the higher the regard for those rights the greater will be the popular confidence in the Army. For the first time in the history of this country we have in fact a truly democratic and popular Army. It has come from the people. Tens of thousands of homes have been affected. In the welfare of the Army millions are concerned directly and the entire public interested generally.

Expediency, in the highest sense of the term, as well as law, requires that the Army itself be quick to see that justice is maintained within it. The men

now drafted from all walks of life and placed, whether they will or not, in the military service of the country are wholly without previous military training and it is only natural to expect many transgressions against discipline, certainly in the early days of their service. They are entitled to justice as established by law, and those who are giving them up to the service of the country have the right to feel, to know, that they will not be lightly charged with military offenses, nor branded while in the service of their country as criminals, except after a fair and impartial trial and on proof which can meet the legal test.

11. There is a revisory power here, which must be exercised. It will, of course, be exercised with all due regard for the proceedings and strictly within the limitations of the war.

S. T. ANSELL,
Acting Judge Advocate General.

NOVEMBER 10.

Inasmuch as this opinion is the result of long and thorough conference with my associates in this office, I would prefer that each of them read it, and, for the benefit of the record, express his concurrence or dissent.

S. T. ANSELL,
Acting Judge Advocate General.

Concurring.—James J. Mays, lieutenant colonel, J. A.; George S. Wallace, major, J. A., O. R. C.; Guy D Goff, major, J A., O. R. C.; William O. Gilbert, major, J. A., O. R. C., Lewis W. Call, major, J. A., U. S. A.; Edward S. Bailey, major, J. A., O R. C.; William B. Pistole, major, J. A., O. R. C.; E. M. Morgan, major, J. A., O. R. C.; Eugene Wambaugh, major, J. A., O. R. C.; E. G. Davis, major, J. A., O. R. C.; Alfred E. Clark, J. A., O. R. C.; R. K. Spiller, J. A., O. R. C.; Herbert A. White, lieutenant colonel, J. A.

Dissenting.—None.

ANSELL EXHIBIT B.

MAJ. GEN. E. H. CROWDER'S MEMORANDUM IN OPPOSITION TO THE REVISORY POWER, AND THE SECRETARY OF WAR'S DISPOSITION OF THE INSTANT CASE.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, November 27, 1917.

Memorandum for the Secretary of War.

On November 10, 1917, there was presented for your personal consideration by Gen. Ansell, Acting Judge Advocate General, a memorandum brief in support of his action on the trial and conviction for mutiny of 12 or 15 noncommissioned officers of Battery A of the Eighteenth Field Artillery. In the discussion of the record of the case itself, Gen. Ansell had come to the conclusion that the evidence did not warrant a conviction of the offense of mutiny, that many errors of law appeared on the face of the record, and that, while the court had jurisdiction and "its judgment and sentence for that reason could not be pronounced null and void," errors in law and the unfairness of the trial "justify, upon revision, a reversal of that judgment." Gen. Ansell, first inviting attention to section 1199, Revised Statutes, providing that—

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army"—

concludes his review of the case as follows:

"In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants and recommend that the necessary orders be issued restoring each of them to duty."

I shall not address myself for the present to the merits of the case or to the proper administrative action that should be taken in respect of it, but rather to the statement of Gen. Ansell in his memorandum brief, that an ill-considered and erroneous change of attitude on the part of the Judge Advocate General's Office that occurred within a score of years after the close of the Civil War has profoundly and adversely affected the administration of military jus-

tice in our Army; that "errors of law, appearing on the record, occurring in the procedure of courts-martial having jurisdiction, however grave and prejudicial such errors may be, are absolutely beyond all power of review"; that you and your immediate military advisers can never appreciate the full extent of injustice that has resulted to our soldiers through the operation of this rule; that a proper sense of the injustice can be felt only by those who exercise immediately the authority of the Judge Advocate General's Office; and that even those thus experienced can gather a full impression of the wrong done only by complete mental inclusion of that vast number of cases where concededly corrective power ought to have been, but was not, exercised in each year of the past forty-odd years. Gen. Ansell adds:

"During the past three months, in scores, of not hundreds, of cases carrying sentence of dishonorable expulsion from the Army with the usual imprisonment, this office has emphatically remarked the most prejudicial error of law in the proceedings leading to the judgment of conviction, but impelled by the long-established practice has been able to do no more than point out the error and recommend Executive clemency."

In handing the memorandum brief to me for my study, you asked my attention to these statements and expressed your surprise that such a situation as is here depicted could have existed in the face of an express grant of power to the Judge Advocate General, which Gen. Ansell finds in section 1199, Revised Statuts, to modify or reverse the approved proceedings of courts-martial. You directed me to examine the brief and make a report thereon. I have had a limited time in which to do this, but the results of my study, which I think is complete enough to answer the main propositions, follows:

The logic of Gen. Ansell's brief converges to its conclusion in these distinct channels:

1. That the single word "revise," as used in section 1199, Revised Statutes, by ordinary construction so clear as to abate any precedent or accepted meaning confers upon the Judge Advocate General not only the power to examine, analyze, and review courts-martial proceedings, but also invests the Judge Advocate General with the power to modify or reverse the same.

2. That the history of the legislation discloses that the statute was originally intended to confer this power upon the Judge Advocate General.

3. That the administrative history of the department discloses that the power was actually utilized during the Civil War period and apparently until the early eighties.

4. That the power has never been questioned by the civil courts or other civil authority.

5. That the power is, and for a long time has been, vested in the judge advocate general of the British Army.

Since the brief concededly purports to overturn the established practice of over one-third of a century, and to advance a doctrine as to which there is little or no previous expression or any authority or pinion utside of the brief itself, it will be well to follow the outline of discussion upon which the brief is built, and to address ourselves first to the contention that the word "revise" in section 1199, Revised Statutes, confers upon the Judge Advocate General the power to review and then to modify or reverse the approved proceedings and sentences of courts-martial.

1. *Meaning of the word "revise."*—Practically the whole fabric of Gen. Ansell's argument is built upon an interpretation of the meaning of this single word "revise." In support of the broad meaning which he gives this word, his brief collates definitions of the word by lexicographers and jurists. On the authority of the Standard Dictionary, which defines the word "revise"—

"To go or look over or examine for the correction of errors, or for the purpose of suggesting or making amendments, additions, or changes; reexamine; review. Hence, to change or correct anything as for the better or by authority; alter or reform"—

he classifies the word "review" as a synonym of the word "revise" and upon this justification indiscriminate definitions of the words "revise" and "review" are quoted throughout the brief. I think the deductions he makes in this part of his brief are unauthorized.

In essential etymology the word "revise" means "to look over." It has acquired a special meaning going to the purpose of the "looking over," and imports a purpose of suggesting, or making amendments. Thus a proof reader

revises copy and suggests changes. But he does not effect changes. Special committees of men learned in the law revise statutes and codes by special legislative commission, but their revisions do not give legal life to the result of their labors. The legislature must enact the revision as a law. In the same sense the "looking over," the "reexamination" of the proceedings of an inferior tribunal by an appellate court is not the reversal or the modification of the judgment, albeit the revision is for the purpose of making such a change. All this is most significant, since in the statutory grant of so wide a power as that contended for we should expect, by all the analogies of grants of appellate power, to find something more than authority "to look over" or "to examine." Such brief survey of the field of statutes conferring appellate power on the various tribunals of the several States and of the United States as I have been able to make in the limited time I have had to prepare this paper fails to disclose a single instance in which the power to modify or reverse the judgment of inferior courts is deducted from the words "review" or "revise" without the addition of apt words specifically conferring the power to reverse or modify.

Gen. Ansell's brief purports to find one such statute, which he describes as analogous with section 1199, Revised Statutes, granting the power to modify or reverse by the use of the single word "revise." Gen. Ansell says, in part:

"I find the word used in another Federal statute in quite an analogous way. Section 24 of the act of July 1, 1898 (cpa. 541, 30 Stat., 553, bankruptcy law), provides, in part, as follows:

"'The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankuptcy within that juisdiction.'"

Gen. Ansell's brief then proceeds to cite a case interpreting the bankruptcy statute (in re Cole, 163 Fed., 180, 181; C. C. A., first circuit), which he describes as "a case typical of all," in which the court says:

"On a petition to revise like that before us we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the district court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the isues which that court considered."

And from this quotation it is inferred that the court was finding in the word "revise" a broader power to "modify or reverse" the procedure of the lower court. This legislative precedent, as judicially applied, would, if it were properly and accurately set forth in the brief, be most persuasive, and for this reason I have had recourse to the statute itself. I find that the quotation of the bankruptcy act of July 1, 1898, in the brief is incomplete, being a quotation of only a portion of the section conferring appellate jurisdiction on the Supreme Court and the circuit courts of appeal and the supreme courts of the Territories. The portion quoted is from the latter part of the section, the earlier part of the section having conferred general appellate jurisdiction; the words quoted by Gen. Ansell, "shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law," following that part of the section which confers general appellate jurisdiction. In order that you may be fully advised in the premises, I quote the entire section:

"SEC. 24. Jurisdiction of appellate courts. a. The Supreme Court of the United States, the Circuit Court of Appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

"b. The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

The concluding paragraph, marked "b," quoted by Gen. Ansell, follows the underscored language which invests the courts with appellate jurisdiction in express terms. There was no necessity for the court to deduce appellate power out of that part of the section designated above "b" for it had this appellate power by express grant. The discussion of the court in re Cole should, I think, be so understood.

I do not think this part of the reply would be complete without some reference to the manner in which appellate jurisdiction has generally been conferred by statute, exemplified in the following:

(*a*) The act of February 9, 1893, establishing the Court of Appeals for the District of Columbia provides:

"SEC. 7. That any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District of Columbia * * * may appeal therefrom to the court of appeals * * * and * * * the court of appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just."

(*b*) The Judicial Code of March 3, 1911, provides for the exercise of appellate jurisdiction in the following sections:

"SEC. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error, decisions in the district courts," etc.

"SEC. 130. The circuit courts of appeals shall have the appellate jurisdiction conferred upon them by the act entitled 'An act to establish a uniform system of bankruptcy,'" etc.

"SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision could be had, where is drawn in question, etc., may be reexamined and reversed or affirmed in the supreme court upon a writ of error."

"SEC. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases: * * *"

"SEC. 252. The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy," etc.

In the light of what has been said, I think it will be perfectly apparent to you that the court, in re Cole, was in no sense discussing its power to give effect to its conclusions upon revision. It was discussing only the scope of the matters that could be inquired into upon the petition, and found the definition of that scope in the words "revise in matters of law the proceedings of the several inferior courts of bankruptcy." It becomes, therefore, quite impossible to follow the brief we are here reviewing in its assertion that—

"The language of that statute (bankruptcy act) is the very language of this (sec. 1199, R. S.) except that the revision there is expressly limited to matters of law."

There is not even a shadow of analogy between the words of the Federal bankruptcy act investing the circuit courts with specific appellate jurisdiction and the words of section 1199, Revised Statutes, relied upon to invest the Judge Advocate General with appellate jurisdiction.

But I can not conclude this part of the brief without inviting your attention to the definitions which are quoted from Words and Phrases, volume 7. It seems to me that not a single one of the definitions quoted in the brief was addressed to grants of appellate power to courts, but that all are addressed to grants of legislative power to revise statutes, or to the scope of the authority granted to special commissions to revise codes, where it goes without saying the power to revise confers no power whatever to give effect to the revision. There was, however, one definition of the word "revise" on that cited page of Words and Phrases that does go to the meaning of a grant of power carried to a court by the word "revise," but I do not find that this definition is in Gen. Ansell's brief. It is as follows:

"Revision, as used in a statute authorizing the entering of an appeal, after the expiration of the time limited for such appeal, when the court is satisfied that justice requires a revision of the decree appealed from, does not mean reversal or modification, but simply review, reexamination, or looking at again."

I may add, in closing this part of my memorandum, that a rather complete survey of statutes vesting appellate power in tribunals, administrative as well as judicial, fails to disclose a single case where the power to modify and reverse is left to be deduced from such an inapt and single word as the word "revise," without the addition of appellate power granted in specific and unequivocal terms.

2. *History of the legislation.*—Gen. Ansell's brief asserts that—

"The history of the legislation, the early execution given it, its historical place in the body of the law of which it is a part, all clearly show that this must be the meaning assigned to the word 'revise' in the present instance."

It is said that Congress established the Bureau of Military Justice in the light of the necessities of the Civil War, and expressly invested its head, the Judge Advocate General of the Army, with this revisory power. Gen. Ansell's reference

here is to the original statute, the act of July 17, 1862 (12 Stats., 598), in which it was provided that:

"The President shall appoint, by and with the advice and consent of the Senate, a Judge Advocate General, with rank, pay, and emoluments of a colonel of cavalry, to whose office shall be returned for revision the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

The same words were carried forward in the act of June 20, 1864, and no further grant of power is found in the latter statute. In the act of July 28, 1866 (14 Stats., 324), the granting word is still "revise," the only change being the omission of the words found in the earlier statutes, "a record shall be kept of all proceedings had thereupon"; and so the same words were carried forward in section 1199, Revised Statutes, where they remain to base the ground of this contention.

I find nothing in the legislative development that is even worthy of remark in this connection. The word "revise" (or "revision") is the only granting word now as it was in the beginning. There is precisely the same power, no greater and no less. If history is to be invoked, therefore, we must look to the administrative and not to the legislative history of the statute. And this brings us to—

3. *Administrative history of the departmental practice.*—This administrative history has been appealed to in Gen. Ansell's brief to the extent that it is asserted that—

"The records of this office indicate that Judge Holt, the Judge Advocate General of the Army during the Civil War period, did revise proceedings in the sense here indicated."

Judge Advocate General Holt was Secretary of War before he was Judge Advocate General. His position at the bar of the United States was an enviable one. If this statement of his construction of the law is accurate, it would be most persuasive upon me, as I think it would be upon you. Gen. Ansell, however, cites no instance from the records of the Judge Advocate General's office where Judge Holt has indicated such a view, and such examination of the records of Judge Holt's action upon courts-martial proceedings during the Civil War period as I have been able to make does not disclose a single instance of the kind mentioned. Candor compels me to state that in the limited time that I have had to prepare this memorandum no systematic search of the hundreds of records bearing the stamp of Judge Holt's action could be made, and therefore the positive assertion that there exists no single instance of this kind would not be warranted. However, there was revealed from these old and interesting books very significant circumstances most emphatically indicating that Judge Holt never contended for nor exercised the power that Gen. Ansell says was vested in him by the statute, exemplified in the following reference to Judge Holt's opinions:

(*a*) I find on page 269 of volume 11 of the Records of the Bureau of Military Justice (Dec. 16, 1864), over Judge Holt's own signature, a short review of the case of Pvt. Hiram Greenland, who was tried by a court-martial convened by Gen. Howe. The record failed to show the date of the trial or whether there was present a quorum of the court. If Judge Holt had been exercising an indigenous power, such as it is contended he could exercise, he would have taken the action attempted to be taken in the instant case that raises the present contention and would have reversed the judgment. Instead of doing so indorsement "To the President" reads:

"There are fatal irregularities invalidating the whole proceedings and rendering the sentence inoperative, and it is recommended that it be so declared by the President."

(*b*) Again I find Judge Holt writing to Col. W. N. Dunn, Assistant Judge Advocate General, under the caption "Bureau of Military Justice," and under date December 27, 1864, in reference to the case of James Scott, corporal, Ninth Michigan Cavalry, in which the record was fatally irregular in that the arraignment of the prisoner and the reception of his plea had been accomplished prior to the administration of the oath to the court. Instead of reversing the judgment, as he, of course, would have done had he deemed that the power was in him to do so, he writes as follows:

"In similar cases returned from this office, to the officer charged with the duty of revision or executing of the sentence, it has been found advisable to direct his attention to the fact that a proper course to pursue with irregularities of proceedings which can not be corrected, rendering the sentence

inoperative, is to revoke the order of execution, and if the parties are not liable to be subjected to another trial to release them."

(*c*) In the case of W. H. Shipman, in which the charge has been drawn under the general Article of War for an offense clearly recognizable under a specific article, Judge Holt expressed the opinion that such an irregularity rendered the sentence void, but instead of reversing the judgment or attempting to give inherent effect to his own opinion he addressed the Secretary of War, under date December 22, 1864, in part as follows:

"If this opinion is concurred in, the pleadings in the case must be held to be fatally defective and the sentence imperative."

In no single case of perhaps 100 consecutive cases examined by me has there been found an instance in which Judge Holt ever attempted to reverse the judgment of a court-martial. Other cases similar to those quoted from were found in abundance.

Gen. Ansell's brief asserts that the power contended for was utilized during the Civil War period and beyond the Civil War period until the early eighties, when it was abandoned without apparent cause, argument, or reason. A rather hasty examination of the records from 1864 to 1882 fails to disclose a single instance of the exercise of such power. I shall not prolong this brief by citing the cases that I have examined. They cover the administration of Judge Advocate General Dunn and Judge Advocate General Swaim.

4. *Rulings of civil courts.*—This brings us to the culmination of the whole argument in a refutation of the statement in the brief that "Nor has the power here contended for been questioned by the civil courts or other civil authority." This statement evinces a failure to make a thorough search of the records and precedents. In his "Military Law and Precedents," the leading work on the subject, Winthrop, for many years in the office of the Judge Advocate General, and for a time Acting Judge Advocating General during the incumbency of Judge Holt, in the Civil War period, and hence familiar with any course of procedure followed by him, says:

"The accused always has an appeal from the conviction and sentence by court-martial to the President (or Secretary of War); but, in entertaining and determining such appeal, he is assisted and advised by the Judge Advocate General of the Army. Thus, as the tribunal is an executive agency, the appeal therefrom is to a superior executive authority."

And a footnote, on page 51, adds that—

"The Judge Advocate General, under the authority vested in him by section 1199, Revised Statutes, to receive, revise, etc., the proceedings of courts-martial has, of course, no power to reverse a finding and sentence, was held in Mason's case, United States Circuit Court, Northern District of New York, October, 1882."

Mason's case still stands as the undisturbed pronouncement of the Federal courts upon the precise point at issue. Mason, a sergeant, had been convicted by a general court-martial of discharging his musket with intent to kill Charles J. Guiteau, the assassin of President Garfield. The findings and sentence were approved by Maj. Gen. Hancock, the reviewing authority, and the Secretary of War designated as the place of confinement the Albany County Penitentiary. In his review of the case the Judge Advocate General came to the conclusion that the court was without jurisdiction and that the sentence was therefore void. It is important to note that in communicating this conclusion to the Secretary of War the Judge Advocate General did not (as it is here contended that he had the power to do) reverse the decision of the court, but he recommended that the Secretary of War should revoke the order for execution of the sentence.

In this case, however, the Secretary of War declined so to do, and apparently adhered to the opinion that the court was not without jurisdiction and the sentence was valid—an opinion that was substantiated by the decision of the United States Supreme Court on a writ of habeas corpus addressed to the jurisdiction of the court. The prisoner, it seems, was not at the end of his resources. After being delivered to the warden of the penitentiary he sued out a new writ of habeas corpus based on other grounds. His contention was precisely the contention made in Gen. Ansell's brief; that is, that the Judge Advocate General is vested with an appellate power and that his decision against the validity of the proceedings of a court-martial has the effect of reversing the judgment.

His petition alleged, among other things:

"5th. That the Judge Advocate General of the Army recently reviewed the evidence adduced on the trial before said court-martial and on or about August

28, 1882, transmitted to the Secretary of War his report on the said proceedings, in which he renders an opinion reversing the findings and sentence of said court on the grounds:

"1. No jurisdiction in a court-martial.

"2. Employment of the prisoner illegal.

"3. No evidence of guilt, but, on the contrary, proof of innocence.

"6. That under section 1199, Revised Statutes, it is the duty of the Judge Advocate General to 'receive, revise, and cause to be recorded the proceedings of all courts-martial,' and that it was the intention of Congress thereby to invest in the Judge Advocate General an appellate judicial authority over courts-martial, and that the Judge Advocate General has the judicial power, under the law, to review, revise, or reverse or affirm the findings and sentences of all courts-martial, and that his dcision is the ultimate judicial judgment in all such cases.

"That by the judgment and decision of the Judge Advocate General, rendered as aforesaid, reversing the findings of said court-martial the further imprisonment of the petitioner is unlawful and wrongful.

"Further, that his conviction and sentence, and the orders carrying the same into execution, are each and all, annulled and made to stand for naught by the said judicial judgment and decision of the Judge Advocate General reversing the findings and sentence of said courts-martial."

In addressing itself to the contention thus made, the opinion of the court proceeds as follows:

"The second ground of the application is not tenable, because the alleged reversal by the Judge Advocate General of the findings of the court-martial is not a reversal at all and does not purport to be. It is merely an advisory report to the Secretary of War, giving the opinion of the Judge Advocate General upon the merits of the trial and sentence. We might risk our decision here, but as it has been strenuously contended by the council for the petitioner that Congress has conferred authority upon the Judge Advocate General to reverse the proceedings of courts-martial, it is proper that we should express our dissent from such a conclusion. It is urged that because the statute makes it is the duty of that officer to 'receive, revise, and cause to be recorded the proceedings of all courts-martial' that the power to reverse is to be implied. It is not reasonable to suppose that the exercise of such an important power would be conferred in vague and doubtful terms, or that it lurks behind the word 'revise.' Applying the rule 'noscitur a sociis,' the word 'revise' is to be read in connection with the words that precede and follow it, and thus read, 'the duty it imposes is analogous to the duty of receiving and recording the proceedings.' Had it been intended by the statute to introduce such a marked innovation into the preexisting functions of the officer, and to convert a staff officer of the head of a bureau into a judicial officer having the ultimate decision in all cases of military offenses, the power to affirm, reverse, or modify the proceedings of courts-martial would have been lodged in plain and explicit language. The language employed is more appropriate to indicate the discharge of clerical duties.

"It is not intended to intimate that it is not the province and the duty of the Judge Advocate General to revise the proceedings of courts-martial so far as may be necessary to rectify errors of form and to point out errors of substance which, in his judgment, should be corrected by the proper authorities, nor is it doubted that as to all such topics as are within the purview of his official scrutiny his opinion is entitled to that respectful consideration which is due to the dignity and importance of the position which he holds.

"The rule is discharged and the application for a writ of habeas corpus is denied."

I think this memorandum might well close here and with the statement that both civil and military opinion sustain the view that the appellate power in the Judge Advocate General contended for in Gen. Ansell's brief does not in fact exist. However, I have noted a further statement, which constitutes part 5 of this memorandum to wit:

5. *The appellate power of the judge advocate general of the British Army.*—The jurisdiction of the judge advocate general of the British Army in such matters is so obscurely stated in the books which I have examined that I am not entirely clear that I understand his precise relation to the administration of military justice. It appears to be true, from the authorities I have examined, that under the British system this official has the power to reverse and modify the proceedings of courts-martial, but that he does not find that

power in any specific statute, but rather in his relations as a member of the ministry of the British Government. Such authority as he exercises in this regard seems to be not a grant of executive authority to an administrative official, but to arise out of an executive power of the sovereign himself, delegated in this instance to a member of the ministry.

You are aware, of course, of the power you have by statute law to grant upon proper application an honorable restoration to duty to each of the men convicted of mutiny, and I shall shortly prepare an order of this kind and place it before you. I shall continue my study of the general subject to see whether this power of appellate review can not be found in the President himself, as the constitutional Commander in Chief, so that, instead of issuing a simple order of restoration, you may, by direction of the President, modify or disapprove the findings and sentence. It will take some little time to do this. The essentials of the proposition one would have to maintain are that the court-martial jurisdiction is and always has been an attribute of command; that the President would have had this power in the absence of any statute law, and that such recognition as has been given to subordinate members of the military hierarchy in the matter of convening courts-martial and reviewing their proceedings has in no way divested him (the President) of the revisory power which is clearly his in the absence of statutory provision. Immediate relief, however, should not await the completion of a study of this kind or the concurrence of the Attorney General, which I think you would wish in view of the consideration his office has heretofore given the general subject.

E. H. CROWDER,
Judge Advocate General.

NOVEMBER 27, 1917.

As a convenient mode of doing justice exists in the instant cases, I shall be glad to act in reliance upon a usual power and leave this larger question for future consideration, informed by the further study which the Judge Advocate General is giving it. Ordinarily, however, the extraction of new and large grants of power by reinterpreting familiar statutes with settled practical construction is unwise. A frank appeal to the legislature for added power is wiser.

BAKER.

ANSELL EXHIBIT C.

BRIG. GEN. S. T. ANSELL'S BRIEF FILED IN SUPPORT OF HIS OFFICE OPINION, TOGETHER WITH NOTE OF TRANSMITTAL.

DECEMBER 11, 1917.

Memorandum for Gen. Crowder:

1. Here is my brief, which, with his verbal permission, I file with the Secretary of War, and which I hope you will place before him at your convenience.

2. It has been prepared under circumstances which militate against literal accuracy, but it, together with the opinion, substantially and with sufficient accuracy expresses my views.

3. The subject, as I conceive it, is one of tremendous importance. I am quite sure that if the department could change its view of the law and come to concur with me, a practical scheme for the exercise of such power could be established, to the great benefit of the administration of military justice.

4. I fear that this office under the prevailing practice, is exercising too little supervisory power over courts-martial. I cite in my brief, as I mentioned to you the other day, that in the Civil War an Assistant Judge Advocate General was established independently of military command, so that as a representative of the reviewing power of this office he could pass preliminarily on proceedings and thus prevent the execution of illegal sentences. I apprehend that something like this will have to be done again.

5. If you and the Secretary of War, upon thorough reconsideration, can not accept my view of the law, and if it should be thought advisable to seek legislation establishing this power in the department, I hope its exercise will not be subjected to General Staff supervision. Such supervision, it seems to me, would necessarily destroy the judicial character of the power.

S. T. ANSELL.

BRIEF FILED BY PERMISSION OF THE SECRETARY OF WAR IN SUPPORT OF MY RECENT OPINION CONCERNING THE REVISORY POWER OF THE JUDGE ADVOCATE GENERAL OF THE ARMY OVER JUDGMENTS OF MILITARY COURTS.

Statement.—From my earliest interest in military law and the administration of military justice, and especially during my service in the office of the Judge Advocate General, I have seen the evident embarrassment of the department and its consequent failure to do justice according to established legal principles, brought about by the limitations imposed by the view and practice of this office to the effect that if the court had jurisdiction, no matter how flagrant and prejudicial its errors, and no matter how bad its judgment and sentence when tested by established legal principles, no corrective power existed in this office or this department or elsewhere. From time to time the officers on duty in this office, faced by such a dilemma, have turned their minds to the power of revision conferred by section 1199 of the Revised Statutes, in the hope of finding there the necessary remedial authority. But, since the Army has heretofore been small and the cases calling for such revision therefore have been comparatively few, the exigent need for such a revisory power has not until recently been sufficiently manifested to make the question an all-impelling one; and so, in the end, we have all accepted the practice, dissatisfied with it but without sufficient impulse to go to its bottom and overturn it. I should expect the other officers who have been on duty in this office with me and interested in the subject to confirm me in the statement of this attitude.

During this war, for patent reasons, the revision of the proceedings of military courts in this office has taken on an importance which it did not heretofore have. If one essential branch of administration of this office can be transcendently more important than another, it is to be found—at least while this large Army is maintained—in the supervision over these proceedings; that is to say, in the close supervision of the administration of military justice throughout the Army. If the revision is worth the name, it should be a revision for gross and prejudicial errors of law that make a conviction bad, as well as for those that make the judgment void. It should be done with such thoroughness as to carry conviction to all concerned and to secure the respect of the Army and the confidence of the people. It should be so expeditiously done as to make the remedy timely and prevent any great measure of unlawful punishment.

For reasons so obvious as to merit no allusion, our new Army must be expected to administer military justice more crudely than did our small peacetime establishment of experienced Regulars. My experience in this office thus far has shown that this is and will be true. Many cases already have been passed upon and reported to me by Maj. Davis, in charge of the Military Justice Division, and his assistants which admitted of no doubt whatever but that, on indisputable principles of law and justice, the judgments and sentences therein were based on error and ought to be revised and set aside if the power to do so existed. So flagrantly and patently illegal were many of these that I presented them to the entire body of my associates in an endeavor to discover, with the help of their counsel, some means whereby, in consonance with law as well as with the practice of the office, the judgment might be modified and the innocent victims restored, unblemished by wrongful conviction, to their honorable places in the service. It was the passing upon such cases which marked the obvious necessity for the power of revision in this office. We were driven to take up, and we did take up, for consideration with a seriousness that seems unappreciated the question of the proper construction of the statute in question, with the result that I and my office associates concluded with the utmost confidence and conviction that that statute does adequately confer upon the Judge Advocate General of the Army this very just and necessary power.

The case that of many others served most to indicate the exigent need of such power and its exercise in the interest of law and justice was the so-called mutiny case. It was upon this case we expressed the views and conclusion which the department finds unacceptable. This was an alleged mutiny of the noncommissioned officers and others of a certain battery of Field Artillery. The errors of law and the consequent injustice, as revealed by the proceedings in this case, were so palpable and prejudicial that it is difficult for me to see how any fair-minded official, having the duty to pass upon the record, could have failed to perceive them and exert all his power to remedy the error and injustice. These men did not commit mutiny. A youthful and capricious officer was responsible for the entire situation. He himself was guilty of tyrannous and oppressive conduct. Notwithstanding this, charges were pre-

ferred, not against him for his tyranny, but against these men for mutiny. The charges were referred to the proper convening authority, an officer of high rank, who ordered the court for the trial of these men. A court tried and convicted them and sentenced them to long terms of imprisonment, and the reviewing officer approved the convictions and sentence. Where such chain of action as this can occur there is left no room for the surprise that I otherwise should have felt at the failure of the proper authorities to court-martial the young officer himself. I frankly confess my fear that such a failure of justice as this, under such circumstances, involving so many officers whose concern it was to see that justice was done, is symptomatic of more general deficiencies that are the usual concomitants of that institutional formalism which in my judgment so hinders our military development.

It was to correct such errors that the entire force of this office, including able and distinguished lawyers recently coming to us from civil life, devoted itself to a thorough study and consideration, extending over a period of more than three weeks, and reached the conclusion that the statute clearly confers upon this office revisory power necessary to do justice in such cases. Accordingly, convinced of the legality of that course and apprehending that no objection could be taken thereto, I set aside the judgment of conviction in this and other pending cases and recommended that orders issue restoring these innocent men to their places in the Army.

Inasmuch, however, as this action was a reversal of an administrative practice in this office which had never before been thoroughly considered or examined so far as I knew, I sent to the Secretary of War for his personal consideration a copy of the opinion, scarcely doubting that the action taken by me would merit his entire approval as well as that of the Judge Advocate General, so necessary and expedient was the authority, so clear the law, and so humane and righteous its application.

The Secretary of War having sought his advice, the Judge Advocate General has disagreed with me, and finds no such power. Upon his advice, therefore, the judgment of conviction in this case is to stand, though it is proper to add, quite a number of other instances in which I likewise set aside erroneous judgments have been, due to administrative methods, approved by the department and action taken accordingly.

Believing that our people who are giving up their sons to the national cause could not be content with, if they were apprised of, a system of military justice that is admittedly without power to correct conceded wrong and injustice to the most sacred rights of man and soldier; conceiving that the question is fundamental and far-reaching in its import; convinced that existing law places us in no such humiliating position and that the action of the department was wrong beyond all question and can be shown convincingly and almost to the point of demonstration to be so; and mindful that undue deference to past peace-time views and administrative practices will defer the adoption of better methods and prove highly harmful to our new Army, in an earnest desire to be helpful to the extent of my ability and use whatever of strength I have to aid in the establishment of an adequate and efficient administration of military justice, I file, with the permission of the Secretary of War, this brief of my views:

First, as to the action taken in the mutiny case.

I. The action taken by the Secretary of War on the advice of the Judge Advocate General has been taken under very evident misapprehension. Such action is predicated upon the correctness of conviction, and the acceptance of such an act of grace by these innocent men necessarily implies a confession of guilt of a crime, which, upon well-established principles of law and justice, they never committed. Justice is a matter of law and not of executive favor.

The Judge Advocate General, advising the Secretary of War, said:

"You are aware, of course, of the power you have by statute law to grant, upon proper application, an honorable restoration to duty to each of the men convicted of mutiny, and I shall shortly prepare an order of this kind and place it before you."

And immediately thereupon the Secretary wrote, adopting the suggested action, as follows:

"As a convenient mode of doing justice exists in the instant cases, I shall be glad to act in reliance upon a usual power and leave this larger question for

future consideration, informed by the further study which the Judge Advocate General is giving it."

This action can not be "a convenient means of doing justice." The Secretary, for the moment, has failed to distinguish between executive action in the nature of a partial pardon and judicial action, which goes to the erroneous judgment of conviction itself and modifies it, reverses it, or sets it aside. The statute under which the proposed action is to be taken is to be found in the statute relating to the military prison and the prisoners therein, and is as follows:

"SEC. 1352, R. S. The commandant [that is, of the military prison] shall take note and make record of the good conduct of the convicts and shall shorten the daily time of hard labor for those who, by their obedience, honesty, industry, or general good conduct earn such favors; and the Secretary of War is authorized and directed to remit, in part, the sentences of such convicts and to give them an honorable restoration to duty in case the same is merited."

And the modifying act of March 4, 1915 (38 Stat., 1074), as follows:

"Whenever he shall deem such action merited, the Secretary of War may remit the unexecuted portions of the sentences of offenders sent to the United States Disciplinary Barracks for confinement and detention therein, and in addition to such remission may grant those who have not been discharged from the Army an honorable restoration to duty and may authorize the reenlistment of those who have been discharged or upon their written application to that end order their restoration to the Army to complete their respective terms of enlistment, and such application and order of restoration shall be effective to revive the enlistment contract for a period equal to the one not served under said contract. (Par. 7, sec. 2.)

And—

"The authority now vested in the Secretary of War to give an honorable restoration to duty, in case the same is merited, to general prisoners confined in the United States Disciplinary Barracks and its branches, shall be extended so that such restoration may be given to general prisoners confined elsewhere; and the Secretary of War shall be, and he is hereby authorized to establish a system of parole for prisoners confined in said barracks and its branches, the terms and conditions of such parole to be such as the Secretary of War may prescribe."

The action thus authorized was never intended to apply in cases of an unlawful conviction, and this the terms of the statute clearly indicate. It expressly applies to convicts and general prisoners dishonorably discharged from the service. It was enacted by Congress under its power to make rules and regulations for the government of the Army and to prescribe the eligibility of those who enter or are in the Army and the conditions under which they serve. Looking at it from the executive viewpoint, it is but executive favor. As I pointed out in my former opinion, in cases of such restoration the conviction stands. The restoration itself is predicated upon a lawful conviction and a dishonorable expulsion from the Army in consequence of it. It can be taken only upon the application of him who has been thus expelled. An executive action partaking of the nature of the pardon is not the proper remedy in a case where a man, concededly, has been unlawfully convicted, if there be other means of doing justice. A pardon does not proceed upon the theory of justice, but of mercy. The man who seeks a pardon does so upon an express or implied admission of guilt. The pardon itself conclusively implies guilt. A pardon is no remedy for wrong done the innocent.

Speaking to the present case these noncommissioned officers, soldiers of excellent record, were, when judged by universally recognized legal principles, erroneously, unjustly condemned; they stand convicted of an offense than which none, in a soldier, can be more heinous. Restoration to the Army does not change the judgment of conviction. Restored to the Army they ought to be; not, however, as an act of grace and mercy, but as an act of right and justice. Such a restoration is but an attempt to forgive these men for an offense which none of them ever committed; and, notwithstanding such restoration, the record against them is made and there it stands. They have been expelled from the Army unless the judgment be reversed; they have been out of the Army since the day the sentence was executed. All rights and honors incident to their service they have lost, their records as soldiers largely ruined. In such a case the right thing to do is to set aside the conviction; to reverse the judgment of the court; to declare that these men had never been lawfully convicted; and that they have never been lawfully out of the service—a service

which they had never dishonored. The power to do the right thing is to my mind unmistakably found in the section to be discussed. I hope and request that final action differing from that here prayed will not be taken until after this brief shall have been given the consideration which the subject of which it treats well merits.

The Secretary then continued to express the following general view with respect to the power to be deduced out of this statute—

"Ordinarily, however, the extraction of new and large grants of power by reinterpreting familiar statutes, with settled and practical construction, is unwise. A frank appeal to the legislature for added power is wiser."

I think it will be shown by this brief that the well-established general principle here enunciated has no proper application to the action taken by me under this State. It can have no application where this statute never has been interpreted by the courts; where the practical construction is not settled, but palpably inconsistent and confused; where there is such overwhelming necessity for an exercise of the jurisdiction. That these things are so can be shown quite convincingly.

II. It is as regrettable as it is obvious that those who oppose my views do not vision in the administration of military justice what the new army of America will require, nor do they even see what the present is revealing. They are looking backward and taking counsel of a reactionary past whose guidance will prove harmful if not fatal.

(1) *The views of the Assistant Chief of Staff and the Inspector General savor of professional absolutism.*—The opposing arguments follow administrative practice blindly and, for the most part, are but mere professional absolutisms developed under the conditions obtaining in our country since the broadening activities of the Civil War period passed away. I poignantly regret the concurrence of the Judge Advocate General, who habitually and constitutionally entertains far more progressive views. The reasoning that comes from the office of the Chief of Staff and Inspector General is but the apprehension of those who are counseled by their fears and who mistrust all that disturbs an absolute order of things. Opposition of that kind has manifested itself against every suggestion of progress throughout the development of institutions. Such argument proceeding on narrow military principle is adduced to the support of power rather than to the human individual rights offended by an abuse of it. In its essentials it is this: The battery commander was a commissioned officer with the power of discipline over his battery; he exercises his power under an amenability to his superiors in the hierarchy, and they all, tacitly, at least, approved of what he did; military justice was appealed to to vindicate his power through a court composed of excellent officers of experience and rank, and the court did vindicate him; all these officials were wise, experienced, and just, and therefore their judgment must not be impeached. The whole structure of government recognizes the fallibility of human administration and endeavors to minimize its evil effect by placing upon it the check to be found in the thoughtful and well-considered review of those who have been trained to the detection of those fallacies.

It is only the mind of the extreme professionalist that fails to see that a man's judgment may be impeached without reflecting upon his integrity. In this case the gross misconduct of this commanding officer is conceded; and yet it is said that these men, subjects of his misconduct, must have their cases determined without reference to his oppressive and tyrannous action. The legal mind, trained to a consideration of the elements of every offense, and appreciating that mutiny must consist of an opposition to lawful authority with an intent to subsert it, could not have failed to perceive that this was not a case of opposition at all in the sense that makes mutiny, nor was there any evidence of the necesssary intention to overcome and depose constituted authority. My own sense of right and justice and discipline would have impelled me to court-martial, not the men, but the officer himself, and I still think that that should be done. The human error that marked this case, judged according to established principles known to every lawyer, has marked and is daily marking others.

Army officers, acting on a mistaken sense of loyalty and zeal, are accustomed to say, somewhat invidiously, that "courts-martial are the fairest courts in the world." The public has never shared that view. In any event, it is difficult to maintain that the judgment of this. the crudest of all courts, exercising

such an extent of jurisdiction, is entitled to greater deference than those of the civil tribunals, the review of which, to insure correction, is fundamental in our law. So much as there is of summariness in courts-martial procedure is solely attributable to military necessities. But this Government should never take the life of any soldier or apply to him extreme penalties without the certainty of the correctness of judgment. If the judgment be sound and the punishment certain, nothing more should be demanded. This case in itself is of comparative little importance, but the questions raised and to be determined by it are fundamental in the administration of military justice.

(2) *The opposing legal views are anachronistic; they are given a backward slant through undue deference to the theory of an illustrious text writer as to the nature of courts-martial, a theory which civil jurisprudence has never adopted but distinctly denied.*—The Judge Advocate General deduces out of the power of revision which belongs to his office no substantial meaning whatever. Obviously he is led to this restrictive, indeed extinguishing, interpretation because of his fear of obtruding judicial functions within a field of authority that in his judgment properly belongs to the power of command. He would prefer to believe that such revisory power does not exist; otherwise this office must sit in revision upon the judgments of convening and reviewing authorities based upon their power to command on one hand, and in turn be controlled by the power of command of the Secretary of War and Chief of Staff upon the other. In my judgment, it is too clear for argument that courts-martial having once been brought into being their proceedings and judgments when properly completed and all that is incident thereto, are not based upon, but indeed are independent of, the power of command as such. Winthrop thought otherwise, and he has been followed blindly ever since by the War Department, though more recent decisions of the Supreme Court of the United States have exposed the fallacy of his views.

(*a*) Winthrop's theory was wrong in reason. Winthrop in a double-leaded heading in his work on military law says that a court-martial is "not a part of the judiciary, but an agency of the executive department." This is the beginning and the cause of the difficulty. The only authority he quotes in connection with the assertion is a statement from Clode to the effect that in the British Army the power of courts-martial comes from the Crown, where, of course, differing from here, the King in theory is the fountain of justice. His text continues:

"Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the Executive power provided by Congress for the President as Commander in Chief to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."

The non sequitur here is absolute and obvious. "Not belonging to the judicial branch of the Government," he says, then courts-martial must necessarily belong to the executive department, are merely instrumentalities of Executive power and utilized under his orders. Since the days of Winthrop this has been the height of orthodoxy; and we have all been steeped in the teachings that follow upon that illogical and fallacious syllogism.

It is rather surprising that an unsupported text-book statement, sustained by so little logic, should have gone so long unexamined by those in military authority, even if judicial decisions had not exposed the fallacy. To be sure, courts-martial are no part of the judicial system referred to as such in the Constitution, but this does not place them under the Executive power. They are courts all the same, with their bases deep down in the Constitution. The courts of the several Territories have never been courts of the United States in the constitutional sense, nor have they ever had any other constitutional basis than the power of Congress to make rules for the government and disposition of the territory of the United States. But who would contend that they are under the Executive power? The courts, both Federal and local, of Porto Rico and Hawaii, and the courts of Alaska and the Philippines, indeed the courts of the District of Columbia, the United States Courts of Customs Appeals, and the Court of Claims, are not constitutional courts of the United States, in the strict sense, inasmuch as in them is deposited no part of the judicial power as defined in the Constitution; they constitute the courts, however, provided for by Congress under other grants of power. But no lawyer would contend, for that reason, that such courts are subject to Executive power.

(*b*) Winthrop's theory was wrong on principle and precedent. Courts-martial as a means of military adjudicature long antedated the Constitution. They are recognized in the fifth amendment in the exception there made as to cases arising in the land and naval forces, and elsewhere in the Constitution. As they exist to-day in our land, and as they have ever existed here, they have been creatures of legislative enactment, under the power of Congress to make rules and regulations for the government of the Army and Navy. The king as a fountain of justice, military and otherwise, finds no counterpart here in our Chief Executive except to the extent that supreme powers are conferred upon him by the Constitution. Here the fountain of justice, indeed all prerogative of sovereignty, is in the people, except where conferred by them on their representatives. Except for the pardon power, Congress here is rather the fountain of military justice. Courts-martial are authorized by Congress. The powers that bring them into being are designated and authorized thereto by Congress. The offenses which they may try and the law which they apply are prescribed and enacted by Congress. Their procedure is regulated under the law of Congress. Their sentences and judgments must be in accordance with the law of Congress. All this has been said too frequently by the Supreme Court of the United States to be doubted. They are, then, tribunals created by Congress, administering the law of Congress, and responsible to that law alone. It is established by an unbroken line of decisions of the Supreme Court that a court-martial is the creature of Congress, and as a tribunal it must be convened and constituted in entire conformity with the provisions of the statutes, or else it is without jurisdiction. (Dynes *v.* Hoover, 20 How., 82; Keys *v.* U. S., 109 U. S., 340; McCloughry *v.* Deming, 186 U. S., 62.)

(3) *The teachings which followed upon the premise that courts-martial are executive agencies have all been disproved by the Supme Court of the United States, though this department still clings to them.*—Those teachings were:

(*a*) That courts-martial were not courts at all in any proper sense of the term;

(*b*) That, therefore, they tried an act in its military aspects alone and not the full resultant crime recognized as such by general public law;

(*c*) That, therefore, judgments of courts-martial could not be pleaded by a soldier in bar of trial by a Federal court; and

(*d*) Being executive agencies, they are subject to the power of command.

Those teachings were all wrong, and the sooner we abandon them the better.

(*a*) Courts-martial are courts created by Congress, sanctioned by the Constitution, and their judgments are entitled to respect as such. (Runkle *v.* United States, 122 U. S., 543, 555; McCloughry *v.* Deming, 186 U. S., 49, 68; Ex parte Reed, 100 U. S., 13, 21; Swaim *v.* United States, 165 U. S., 558; Keyes *v.* United States, 109 U. S., 336, 340; Grafton *v.* United States, 206 U. S., 333, 348; Smith *v.* Whitney, 116 U. S., 167, 178.)

(*b*) Courts-martial do not try simply for the crime in its military aspects, but for the full and complete offense as recognized by the law of the land. (Ex parte Mason, 105 U. S., 696; Carter *v.* Roberts, 177 U. S., 496; Carter *v.* McCloughry, 163 U. S., 365; Grafton *v.* United States, 333, 348.)

(*c*) The judgment of a court-martial being a complete adjudication by a competent tribunal of the offense as known to the law of the land, is a bar against a second trial in any court of the United States. (Grafton *v.* United States, 206 U. S., 333, 348.)

These cases prove conclusively that a court-martial is a judicial tribunal of vast powers, whose jurisdiction extends to all who may belong to or are retained in our forces, affecting the life and liberty at the present time of millions; and that this jurisdiction extends to all conduct of such persons, without distinction between civil and military aspects. This office and the Army prior to the Grafton case had regarded it as settled law and justice, and sternly opposed the contrary view, that a soldier, though tried and punished by court-martial, could again be tried and punished by Federal civil courts without infringing his constitutional rights and his rights to justice.

(*d*) The functions of courts-martial are inherently and exclusively judicial and therefore are not subject to the power of command as such, but only to judicial supervision established by Congress.

It has been said that the President has the power to establish a system of courts-martial, and that in deference to that power, therefore, courts-martial are subject to his control. This I deny. I do not say that if the Constitution had not spoken, the power and necessity of the Commander in Chief to maintain discipline in the Army would have been sufficient to authorize some system of

military adjudicature; and it may be that if Congress had not spoken under its power to make rules of government for the Army, the President could have filled the void. But when Congress does speak out of its power, the President may not speak within the same field. He may not array himself in opposition to the legislative rules governing the administration of military justice. Congress has designated what commanders subordinate to the President may convene courts-martial, and the President can not say otherwise. Congress has said what law they shall apply, and the President may not prescribe another.

Congress has regulated the punishment, and the President can not prescribe different penalties. The most that can be said is, inasmuch as Congress has not endeavored to deprive, even if it could deprive, the Commander in Chief of his power as a convening authority, the President may himself still convene a court-martial, and his name may, therefore, be added to that list of convening authorities designated by Congress. But that power is limited to him; he may convene courts-martial, but when convened they will be subject to all the law of Congress; he can not, by reason of that power, control courts-martial convened by others.

As was said in a report by the Judiciary Committee of the Senate, quoted with approval by the Supreme Court in Swaim *v.* United States (165 U. S., 558), with respect to the acts of Congress authorizing the constitution of general courts-martial by officers subordinate to the President, such acts are not restrictive of the power of the Commander in Chief, but—

"* * * merely provide for the constitution of general courts-martial by officers subordinate to the Commander in Chief, and who without such legislation would not possess that power, and that they do not in any manner control or restrain the Commander in Chief from exercising power which the committee think in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised."

His power of control over the judgments of courts-martial not convened by him comes itself from Congress, and on principle he can add nothing to it.

It is a fallacious reasoning to say that Congress, under its power to make rules and regulations for the government of the Army, may not confer any authority upon a subordinate official without conferring it upon the President as Commander in Chief, especially when the power conferred is inherently judicial. Such an argument was advanced by the Court of Claims, but it is to be observed that the Supreme Court did not adopt that view. On the other hand, it quoted with approval the report of the Senate Judiciary Committee, which was to the effect (1) that the subordinate authorities would not have had such judicial power without the authority of Congress, and (2) that the President did have the power to convene a court in the absence of legislation to the contrary.

(*e*) Court-martial procedure being judicial from the beginning to the end (Runkle's case, 122 U. S., 588, and all subsequent cases cited), the power of revision, if it exists, is also judicial and therefore not subject to the power of command.

It is a maxim of the law that judicial power can not be restrained; which means to say, it can be controlled by no power except by superior judicial authority drawing its power from the same source. This course of the judicial power of courts-martial is Congress; and only by Congress alone, or by some authority appointed by Congress, can a court-martial be controlled. A supervisory judicial authority Congress conferred upon the Judge Advocate General by the section discussed. The fact that the Judge Advocate General is in a military hierarchy and in an executive department does not subject his judicial or quasi judicial functions to the power of command. It is established by the decisions of the Supreme Court of the United States that an officer of an executive department charged by Congress with judicial or quasi judicial duty is not subject in the performance of such duty to any executive authority. Thus, the decisions of the Commissioner of Patents stand as the final judgment of the executive departments beyond the control of the Secretary of the Interior. (Butterworth *v.* United States, 112 U. S., 50.)

The supervision which a superior in an executive department may have over an officer in the same department who performs judicial or quasi judicial functions is on principle limited to administrative and executive functions, and does not relate to the quasi judicial. It may be that the legal relation between the head of the department and the officer performing judicial functions is such as to make the decisions of the latter subject to the former's judicial review,

but certainly not to the review of another and nonjudicial bureau of the same department.

(*f*) Such judicial revision is not subject, therefore, to the usual General Staff supervision.

The practice which obtains in the General Staff of passing upon the opinions of this office in such matters of pure law is; obviously, as hurtful to proper administration as it is inconsistent with legal principles. From the common-sense point of view alone, how futile it is to direct the attention of the General Staff, military experts presumably knowing nothing of technical law, to the control and supervision of the judicial functioning of the Judge Advocate General, who presumably is thoroughly skilled in matters of law and trained to judicial functions. I can conceive a large field in the realm of military conduct and policy—not of detailed administration—in which as I see it, the General Staff was created to function and in which good results will be achieved only when they are thus confined and devoted to larger tasks. I address myself to a situation and not to sporadic instances of such administrations. Considerable time of that great body and also of this office is consumed in conferences and discussions required by reason of such assumed power of supervision of the decisions of the office in matters of technical law and judicial duty. I can recall distinctly my inability to get a General Staff officer to grasp the usual technical significance and the propriety of applying the legal principles usually expressed in damnum absque injuria; res inter alios acta; generalia specialibus non derogant, and like technical concepts. I can recall a recent instance of a plain case of a lack of jurisdiction in which the Chief of Staff personally functioned for a considerable part of three days in an endeavor to make up his mind whether the error was jurisdictional, rendering the judgment null and void, or was error of law, simply requiring a reversal in my judgment. No war of any consequence can properly be conducted with such General Staff administration.

III. The whole argument on the other side is found in the contention that the word "revise" has no substantial meaning but has reference only to clerical corrections—One single fact exposes the utter fallacy of that contention, and had it been considered must have prevented an expression of that view—That fact is this: The word "revise" is an organic word, which solely creates and defines the duties of an entire bureau. Congress went to the great length of creating an independent bureau in the War Department for the sole and declared purpose of having it "revise" the proceedings of all military courts, and made that duty of revision the sole duty of that bureau.

It is true that the word "revise" as descriptive of the duty of the Judge Advocate General is found associated in the Revised Statutes with other words that are not of an organic nature. But in construing the Revised Statutes, if there be doubt enough to justify construction, as there is not in this case, the antecedent legislation may and should be examined; and when examined, it can be seen that there can be no application of the doctrine of noscitur a sociis here; indeed, because of the established meaning of the word "revise" there could have been no application of the doctrine under any circumstances.

The act of July 17, 1862 (12 Stat., 598), was an act establishing anew the office of the Judge Advocate General, and no functions were established for that office other than that enjoining that—

"To his office shall be returned for revision all records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

The declared purpose of having the records returned to this office was that the Judge Advocate General should revise them and make a record of his proceedings in revision.

Again, the act of 1864 (13 Stat., 145) created a separate bureau of the War Department for this special purpose in the following language:

"SEC. 5. There shall be attached to and made a part of the War Department during the continuance of the present rebellion a bureau, to be known as the Bureau of Military Justice, to which shall be returned for revision the records and proceedings of all courts-martial, courts of inquiry, and military commissions of the armies of the United States, and in which a record shall be kept of all proceedings had thereupon."

And in the following section, descriptive of the duties of the Judge Advocate General, the statute uses the words, "He shall receive, revise, and have re-

corded all proceedings of courts-martial," etc. These words describe his duties, but the extent of revision is, of course, to be found in the fact that it was the sole and single purpose of the creation of the bureau. The duties established for that bureau in its origin are still included within those of the office of the Judge Advocate General. Is it not opposed to common sense and reason to say that the Congress of the United States went to the great length of creating a separate bureau of this War Department for no purpose at all, or, at most, in order that some inconsequential clerical change might be made upon the record?

It is to be observed that the unreported decision in the Masons case, a case which I have been familiar with since 1902, and which for the moment, and perhaps because of its utter lack of authority, I had forgot, holds that upon the doctrine of noscitur a sociis the word "revise" imports but clerical duties. All that that judge said was said without evidence of any study of the statute and without reference to antecedent legislation; and, furthermore, it was the most patent dictum.

But there is another reason why the word "revise" can not be applied to any substantial clerical change in the record. The record is made by the court; it can not be changed except by the court. The record can not be made elsewhere. There is, then, no field for any clerical revision.

To be guided by this line of argument would be to hold that Congress created an entire bureau, whose sole duty should be to dot the "i's" that had not been dotted, and cross the "t's" that had not been crossed, and correct errors of spelling and perhaps of grammar, and to substitute one's personal view of correct punctuation for that which the court reporter had adopted. In other words, Congress went to ridiculous length of establishing a bureau of the War Department where sole objection was to correct the clerical inaccuracies of a court reporter.

But Winthrop accepted this dictum, without examination, and we are engaged to-day in nodding acquiescence to a proposition which, had it come less well sponsored, would have been greeted with impatience.

IV. "Revise," in its every sense—ordinary, legal, and technical military sense—means to correct, to alter, and amend.

The Judge Advocate General's brief, though concurring in the argument that the word "revise" represents purely clerical duties, does in a rather incidental and delicate way suggest that the word "revise" as here used may mean a review for the purpose of correction. If that were the acceptable view of the statute, then Congress must have contemplated that the power of correction existed somewhere. But he does not follow that definition up or rely upon it to locate the power of revision. The Judge Advocate General, so far as I can find, has no real authority for any such definition. His own illustrations fail completely. If a proof reader revises a copy, he himself changes it so as to make it conform to some standard. The committee who report a proposed revision of the law to Congress do not revise the law; Congress does it. The committee do not revise the law; the legislature does, making the desired corrections as revised. Those were the practical examples the Judge Advocate General chose to rely upon.

(*a*) The ordinary meaning of the word "revise" is not to review for the purpose of corrections, but to perform the act of correction. Look up the word in the ordinary dictionary; look around your library at the "revised editions"; look at the "Revised Statutes," or "Revised Codes," and no doubt whatever can be entertained of its meaning. It is an active, decisive power that results in a change in modifications of the proceedings revised. Ordinarily "revise" is a broader word than "review," especially so in the literary sense; and the two may be distinguished in that the former is active and decisive, the latter passive, informatory, and advisory. In a legal sense, "revise" while less commonly used in Anglo-American law than "review" as establishing supervising or appellate power, seems to be synonymous with it.

(*b*) In its legal sense the meaning of the word, as evidence by a multiude of examples of its use, is unmistakable; and if the single example heretofore given of its sinifigcance when used in statutes were "persuasive" at all, those to be given now should prove absolutely convincing.

The Judge Advocate General says that such examination as he has been able to make of legislative precedents "fails to disclose a single instance in which the power to modify or reverse the judgments of inferior courts is deduced from the word "revise" without the addition of apt words specifically con-

ferring the power to reverse or modify." And then, after referring to the use of the word in the bankruptcy statute cited by me, he said:

"This legislative precedent as judicially applied would, if it were properly and accurately set forth in the brief, be most persuasive."

My reference and reliance upon the word "revise," as used in the bankruptcy statute, was quite justified as showing that the word "revise" as there used means exactly what is here contended for—changing the proceedings of the civil inferior courts of bankruptcy so that they shall conform to law. And the appellate power thereinbefore conferred in the statute was not what challenged the attention of the court as a measure of their power over inferior proceedings, but it was the word "revise."

But I submit the following, which ought to be conclusive:

(*a*) The word "revise" is the sole word used in the Constitution of Oregon to confer full appellate jurisdiction upon the supreme court of that State, and that court has given the word a fulsome meaning, even in the face of legislation evidently designed to limit it.

(*b*) The word "review" is used by the Constitution of North Carolina as the sole word for conferring full appellate power upon the supreme court of that State.

(*c*) The word "review" is used by the Constitution of New York to confer full appellate power upon the court of appeals of that State.

(*d*) Randolph's plan for the Supreme Court of the United States was contained in the following resolution:

"*Resolved*, That the Executive and a convenient number of the national judiciary ought to compose a council of revision, with authority to examine every act of the National Legislature before it shall operate." Madison's Journal of Federal Convention, p. 62.)

(*e*) Section 24 of the Constitution of Illinois, 1818, provided "that the general assembly may authorize judgments of inferior courts to be removed for revision directly to the supreme court." This language is peculiarly similar to the language here discussed and none other was needed to confer appellate power upon the supreme court of that State.

(*f*) "Revise" has a meaning here contended for in Constitution of California, Article X, 1849, 1879; Constitution of Alabama, section 3, 1819, and Article IX, 1865; Constitution of Florida, Article XIV, 1838 and 1865.

(*g*) The Court of Customs Appeals has final appellate jurisdiction over decisions of the Board of General Appraisers, all of which is deducible out of the word "review." (Judicial Code, sec. 195.) The word as there used includes the usual appellate powers, including the reversal of the Board of General Appraisers when the court is satisfied that the finding is wholly without evidence or clearly contrary to the weight of evidence. (See U. S. *v.* Riebe, 1 Customs App., 19; Holbrook *v.* U. S., 1 Customs App., 263; Carson *v.* U. S., 2 Customs App., 105; In re Gerdau, 54 Fed., 143.)

(*h*) The decisions of the Comptroller of the Treasury over settlements of accounts by the decisions of auditors is described by the statute (act of July 31, 1894, 28 Stat., 207), as "a revision" and his decisions are referred to as "decisions upon such revision."

(*i*) Section 271, Revised Statutes, defining the power of the first comptroller, provides as follows:

"The first comptroller, in every case where, in his opinion, further delays would be injurious to the United States, shall direct the first and fifth auditors of the Treasury forthwith to audit and settle any paricular account which such officers may be authorized to audit and to report such settlement for revision and final decision by the first comptroller."

(*j*) Section 482, Revised Statutes, defined the powers and duties of examiners in chief in the Patent Office and provided as follows:

"The examiners in chief shall be persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the appellant, to revise and determine upon the validity of the adverse decisions of examiners upon applications for patents and for reissues of patents and in interference cases; and, when required by the commissioner, they shall hear and report upon claims for extensions and perform such other like duties as he may assign them."

(*k*) Section 4914, Revised Statutes, defining the jurisdiction of the Supreme Court of the District of Columbia, provides:

"The court, on petition, shall hear and determine such appeal and revise the decision appealed from in a summary way on the evidence produced before the commissioner at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. * * *"

(*l*) "Review" is the sole appellate word used in section 330 of the Code of Arizona establishing jurisdiction upon the supreme court of that State.

(*m*) "Review" is used also to confer appellate jurisdiction upon the supreme court in section 4824, Code of Idaho.

(*n*) "Review" is thus used in section 7096, Code of Montana.

(*o*) "Review" is so used in section 654, Code of Utah.

(*p*) In State *v.* Towery, 39 So. 309 (Ala.), the question was as to the meaning of the word "revision" as used in a clause of the constitution requiring the legislature periodically to make provision for the revision of the statutes. The court there construes the word in the usual sense of review, alter or amend, and said with reference to the meaning of the word—"Such changes as are admissible are within the purview of the section."

(*q*) In State *v.* King County, 37 Pac. 489, 491 (Wash.), the court deduced its authority to review by way of certiorari an inferior court's decision out of the revisory." Even the dissenting justice in that case admitted that the word "revision" included the power here contended for, but held that in this case it had reference only to those judgments which were already within the jurisdiction of the court by virtue of some other appellate power.

(*r*) The word is, apparently, habitually used as defining the power of courts over municipal corporations, taxation boards, and insolvency proceedings (34 Cyc. 1723); and the word is used in that publication as indicating a revisory power over criminal sentences (12 Cyc. 783.)

The Supreme Court frequently alludes to its power "to revise the judgments" of inferior courts. (See E. G., the Dred Scott decision, 19 How., 453, etc.)

Of course the fact that appellate power is frequently conferred with great particularity in such terms as "revise, reverse, remand, alter, aemnd, and set aside" places no logical or legal restriction upon the word "revise," certainly not when it is used alone.

Eleven of the State constitutions confer full appellate power in one or two words, using none of those enumerated.

The term "revise" and "revision of proceedings," having this general significance, has been known to military law and procedure from time immemorial.

It was known to the early mutiny acts prescribing that no proceedings should be returned to be revised by the court more than twice.

In Tytler's Military Law (1806), page 173, it is said with reference to British military law that the King has no power of revision, but that that function belongs to the courts of justice. He further says—

"All, therefore, that is competent for His Majesty to do, if the sentence of a court-martial shall not meet with his approbation, is to order the court to review their proceedings, and even this power, as above stated, is limited; for the mutiny act declares 'that no sentence given by any court-martial and signed by the president thereof shall be liable to be revised more than once.'"

It is to observed that even at English law the power of revision of court-martial proceedings and sentences is clearly distinguished from the Crown's power of pardon.

"Revision of proceedings" and "proceedings in revision" are terms well known to Anglo-American military law with reference to the power of courts to reconsider and correct their own proceedings, judgments, and sentences.

In 6 Op. Atty. Gen., 203, Attorney General Cushing discussed this power of revision with great thoroughness, saying in that connection:

"It is laid down as a thing not open to controversy in all the books of military law that the superior authority may order a court-martial to reassemble to revise its proceedings and its sentence,"

citing for that authority Hough on Courts-Martial, page 29; McArthur on Courts-Martial, page 136; Griffith's Notes, page 90; Kennedy on Courts-Martial, pages 229, 290; Anon., Observations on Courts-Martial, pages 38-65; Tytler's Military Law, pages 170-338; James's Collection, page 556; Simmons's Practice, 389; De Hart on Courts-Martial, page 203; O'Brien's Military Law, chapter 23.

This procedure ,with the word "revise" as descriptive of it, is an established part of our own military procedure, which occurs in daily practice, is treated of in all texts and is recognized by that name by all our courts.

See Macomb (1809) Duane's Mil. Dic., 1810; Scott's Mil. Dic., '864; Benet's Military Law under "Revision"; also all military texts.

V. The word "revised," as a matter of fact, is in no sense ambiguous, and there is no room for construing it. It would have made no difference, therefore, what the administrative practice was or is. The quality of law is not impaired by nonuse. As a matter of fact, Judge Holt did, in form at least, pronounce sentences invalid, and did not content himself simply with recommending that pronouncement was by superior authority. His views as to the validity of proceedings were expressed in terms that savor of judicial pronouncement, and the orders of the War Department so far as examined seem to respect that quality by confirmance.

The meaning of the word is not fairly questionable. Furthermore, Senators in debate referred to the power conferred as that of a court of review. Congress seems to have had no doubt about it. In such a case practice can not govern.

In writing the opinion I went through the record books of a part of 1863, and my notes of that search reveal that Judge Holt's reviews very frequently terminated with a declaration which, by its form and tenor, indicated, so far as his office was concerned, judicial finality. It was common to conclude with the statements: "Therefore the sentence is inoperative," "therefore this fatal defect must prevent a confirmation of the record," "the sentence is fatally defective," "for error of law committed by the reviewing authority the sentence is inoperative, notwithstanding the confirmation of Maj. Gen. Hooker," "the sentence as it stands is inoperative," "the sentence is invalid and should not be enforced," "the sentence rested upon such a record should not be carried into execution," and such like expressions.

"Sentence is therefore inoperative" occurs eight times; record is fatally defective, and sentence should not, or can not, or must not, be enforced, or carried into execution, or confirmed, sixteen times. The record shows that, in the administration of those days, the Judge Advocate General was regarded both by the President and the Secretary of War as the law adviser upon matters of military administration and justice, and at least no power of command stood between him and those supreme authorities. It also shows that the Judge Advocate General very frequently, indeed one might say, habitually, returned the record direct to the reviewing authorities with instructions as to errors of law and pointing out the necessity for correction where correction could be made in order that the sentence be held operative. That the examination, if not revision, of the records might be the more expeditiously made an Assistant Judge Advocate General, representing preliminary the Judge Advocate General and his power, and not connected with any commander's staff, was stationed in a central situation with duty, as to proceedings, "to call for such as are not forwarded in due season, to examine them, to return for correction such as are incomplete, and to give immediate notice of fatal defects to the proper commanders, that sentence may not be illegally executed." (G. O. 230, A. G. O., Aug. 16, 1864.)

VI. The Judge Advocate General of England certainly did have this power of revision. (I am not advised of his present authority.)

Clode (1869), vol. 2, pp. 359, 364, 360. While his letters patent do not clearly define his duties, it was prescribed therein—

"He exercises the powers of a supreme court of review, as regards the proceedings of all district, garrison, and general courts-martial whatsoever and whensoever."

The following is quoted from Jones's Military Law (1882), p. 94:

"The J. A. G. and his deputy are always civilian lawyers, while the deputy judge advocates, who in England attend at B. C. M., are always military men.

"The J. A. G.'s Department forms a final court of appeals and has the power of upsetting or 'quashing,' as it is called, all proceedings of C. M. and it therefore takes no part in the actual preparation, conduct, or management of prosecutions.

"The J. A. G. is a member of the Privy Council. He is generally chosen from among barristers who are members of Parliament, and they stand or fall with the Government to which they are attached.

"All the proceedings of G. C. M., which at home must be confirmed by the Sovereign, are sent to the J. A. G., and the Sovereign confirms on his responsibility as a Minister of the Crown, and acts on his recommendation.

"The J. A. G. is responsible to Parliament, hence a prisoner, if wronged, can appeal at law against him, for 'the Sovereign can do no wrong.'

"The duties of the J. A. G. are confined to the examination of the proceedings as to their legality, whether the sentences are within statute laws, etc. The expediency of carrying out the sentence, or as to remission, etc., is not his province; the C. in C. advises the Crown on these points." (Pp. 94–95.)

It must be remembered, too, that the civil courts of England exercise a far larger power over the judgments of courts-martial than do our own.

VII. Whence comes the established power to declare proceedings null and void for jurisdictional error? And why should not the larger power include the lesser radical one of correction of legal error?

Nobody essays an answer. Doubtless a reviewing authority, by statute, may "disapprove" a sentence because it is null and void or because it is bad for prejudicial error of law, and I think that frequently it is said in our texts and in our practice that a sentence is "invalid," though not for jurisdictional error. The larger power, in practice, is exercised here in the department. It is extremely difficult for me to comprehend any reason that concedes to this department the larger power but denies to it the lesser one.

VIII. The necessity, in the name of justice, of locating this power in this department, and preferably in this office, where logically, and I think legally, it belongs, must be apparent to all who are familiar with the administration of military justice.

In the first half of November, while I was in charge of the office, I set aside the judgments and sentences in the cases of 19 enlisted men because of prejudicial other than jurisdictional error invalidating the judgment. The number in which on established principles such reviewing power should be invoked should be expected largely to increase.

Courts-martial are courts dealing with the right of life and liberty of all who are subject to their jurisdiction, a number already beyond a million, doubtless soon to pass into many millians, of our citizens. They are courts of law administering the law of this land, in accordance with the law of the land, for a great national purpose. Their judgments are judgments of law. Can it be said that their judgments are beyond all legal inquiry; that though they may be arrived at in contravention of all law, if the court, according to the usual narrow jurisdictional tests had jurisdiction, the judgment, though concededly wrong for error of law, is beyond all correction?

There is to-day, as never before, an urgent, impelling necessity for such revisory power; if not here, then elsewhere. It will not do to say that such errors of law affecting the proceedings to the great prejudice of the accused and rendering the judgment bad because thereof, are rare and for that reason may be ignored. That doubtless was the reason why the power was permitted to remain not fully used or to drop into desuetude. But this day finds the Army increased tenfold. A few more months hence it will have been increased twentyfold, and obviously a year hence the Army of the United States must necessarily, if we are to take the part in this war that this Nation purposes to take, consist of three millions of men. The officers of that Army must necessarily be largely untrained officers, conscious, of course, of their great power, required necessarily to exercise it, and exercising it necessarily without the most enlightened judgment or consideration. It will consist of men just come from the shops, the factories, and the farms, unused to Army life, with its peculiar customs and its rigorous duties, willing but uninformed. With such elements, errors upon the part of the officer on the one hand exercising disciplinary authority and on the part of the enlisted man on the other subjected to such authhority, must be exceeding numerous and resort to the disciplinary actions through the agencies of the court-martial frequent. The triers of the case will be officers of the same class, and so frequently will be the reviewing and approving authorities. Opportunity for resort to court-martial and opportunity for error in the courts-martial poceedings themselves will be largely multiplied over those that obtain in normal peace conditions. There is chance for grave error in the most enlightened legal system, but still greater chance in a legal system which necessarily must be administered by men uninformed in the law, and an immeasurably greater chance in the case of such an Army as ours must necessarily be. I must assume that no man with the interest of the Army and the country at heart and with the ordinary conception of the neces-

sity of maintaining justice in our institutions could doubt the advisability and the necessity of establishing here or elsewhere such revisory power.

I have no shame in confessing that I feel strongly about this, and not in any contentious way. I am not impelled to file this brief because the Judge Advocate General of the Army disagrees with me, nor the Chief of Staff, nor other authority. I am entirely out of the field of contention. I feel strongly about it as a matter between a man and his fellow men, between an officer and the men whom he should protect, between a man and the Army in which he serves, between a soldier and his Nation. What happened to these men can happen to me. A soldier has nothing but his service. He is honored by his professional reputation or dishonored by the lack of it. Society has established certain rules, which are its law and by which human conduct is tested. All lawyers, at least, understand the methods of applying those tests. If the test be not applied in accordince with the law, there has been no test. It is not sufficient to say that a system of administration of criminal justice may not be a fair and just system, though it provide for no appeal, though the fact remains that no enlightened system has ever permitted a judgment to remain as final when reached in contravention of the rules of law. The question here is whether or not, when, according to the well-understood principles of law and justice, a judgment is concededly and palpably wrong, it must remain and persist as the law of the land in condemnation of an individual while it is concededly wrong. It seems to me that a soldier, before suffering the extreme penalty of death or other serious punishment, should, on principle, be entitled to have the proceedings of his trial examined, not solely by the commander convening the court in the field, but by a separate and independent authority, who, skilled in the law, properly circumstanced, can with the necessary deliberation and considerateness pronounce the trial free from prejudicial error. Even in the absence of statute it would be the duty of the department to endeavor to discover or provide a means whereby such a wrong could be righted. In the case that it could invoke a doubtful statute, it would be the duty of the department on all principle to resolve the doubt in favor of its jurisdiction to apply such a remedy. Surely there can be no excuse for the department's not taking the remedial action which the statute clearly authorizes, indeed, I think, requires it to take.

CONCLUSION.

This revisory power should exist; and I doubt not that when exercised with judicial wisdom and discretion, as it must be if it is a judicial power at all, under proper rules and regulations, it will prove a great help, and never a hindrance, to safe and sound administration, and place military justice upon a plane that will cause it to merit and receive, more than it ever has heretofore received, the approval of the American people. I earnestly ask that this matter may be conceived to be, as doubtless it is, one of prime and fundamental importance to our Army. It is a matter affecting the relations of the Nation to its soldiery; it is a matter at the very base of military justice as an institution; it is a matter affecting justice under the law to the individual soldier. Justice under law is as necessary to the American Army as it is to any other American institution.

S. T. ANSELL.

DECEMBER 10.

ANSELL EXHIBIT D.

COL. WAMBAUGH'S PROPOSED DRAFT OF REGULATIONS TO GOVERN THE COURT OF REVISION.

NOVEMBER 10, 1917.

Memorandum for Gen. Ansell.

Subject: Draft of an executive regulation establishing a national military court of revision.

1. Under the authority of section 1199 of the Revised Statutes of the United States there is established hereby in the office of the Judge Advocate General of the Army a national military court of revision with authority to revise the proceedings of all courts-martial, courts of inquiry, and military commissions.

2. The national military court will consist of three officers from time to time designated by the Judge Advocate General.

3. The national military court will take into consideration for purposes of revision such general court-martial cases as may be brought to its attention by any party in interest, or by any member of the court, or by the trial judge advocate, or by the officer having power to approve or disapprove the sentence, or by any judge advocate, whether identified with the case or not.

4. The national military court will take into consideration for purposes of revision such special or summary court-martial cases as seem to be of peculiar importance.

5. The power of revision belonging to the national military court shall not include the power to deal with a case before the officer appointing the tribunal has finally dealt with it and shall not include the power to admit new evidence; but it shall include (*a*) the power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense which in its opinion the evidence of record requires a finding of only the lesser degree of guilt, (*b*) the power to approve or disapprove the whole or any part of any sentence, and (*c*) such other powers as may be assigned to the court hereafter.

6. The national military court will disregard such irregularities as are not clearly shown to have injuriously affected substantial rights.

7. The Judge Advocate General will appoint from time to time officers to serve as counsel on each side of the cases considered by the national military court, and parties in interest shall also be entitled to counsel chosen by themselves.

8. The national military court will announce from time to time rules for its own procedure, not in conflict with regulations prescribed by the President, and not in conflict with the Constitution, statutes, and treaties of the United States.

9. The mere considering of a case by the national military court will not serve to suspend the execution of the sentence.

10. A decision of the national military court will not have validity until approved by the Judge Advocate General.

11. If so ordered by the Judge Advocate General a decision of the national military court will be made public and will be accompanied with an opinion stating the case and giving the reasons for the decision.

EUGENE WAMBAUGH,
Major, Judge Advocate.

ANSELL EXHIBIT E.

COL. WAMBAUGH'S SPECIAL BRIEF IN SUPPORT OF THE REVISORY POWER.

1. Section 1199 of the Revised Statutes of the United States, taking its language from acts of 1866 (14 Stat., ch. 299, sec. 12, p. 334), and of 1874 (18 Stat., ch. 458, sec. 2, p. 244), that:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been heretofore performed by the Judge Advocate General of the Army."

2. What is included within the power and duty of the Judge Advocate General to revise the proceedings of courts-martial?

3. The answer must depend upon the language of that section; and if the language be ambiguous or scanty, the meaning attached to it must be affected by the attitude of mind in which the language is approached. The language certainly is not verbose, though, as will be pointed out later, the chief word used is significent and enlightening, and there may be reason for discussing in a preliminary way, whether the power of the Judge Advocate General over the proceedings of courts-martial would be intended by Congress to be narrow or to be wide.

4. In favor of a narrow consideration there are at least two things to be said. In the first place, the testimony upon which the results of a court-martial are based can not receive from the Judge Advocate General the exact weight to which it is entitled, for stenography can not communicate the appearance of

witnesses, their hesitation or eagerness, and the impression by them fairly made upon the members of the court—in short, the atmosphere of the court room. In the second place, to interfere with the findings of the court-martial and of the appointing and reviewing authority may not unreasonably be deemed as endangering of the prestige of the officers thus overruled, and hence a procedure to the detriment of good order and military discipline.

5. Those considerations in favor of a strict construction of the Judge Advocate General's power and duty have been mentioned in order that they may be seen not to have been forgotten.

6. The considerations on the other side are much more weighty. To begin with, this is a remedial statute, and hence it is to be construed liberally in the light of the perceived evil or danger and in the light of the intended result. Notice the danger. It is, briefly, that skillful justice may not be received by persons peculiarly appealing to the desire of Congress that justice be done and be perceived to be done. The persons in question are, most of them, private soldiers, very young men, far from home, and from ordinary advice and influence, on the average not highly educated, not rich, performing, whether by reason of volunteering or by reason of drafting, a service which is of the highest importance to the Government. Whether language tends to achieve careful justice for such persons must be perceived to be intended by Congress to be construed liberally. Again, courts-martial, though their members are unquestionably conscientious, are composed of men not skillful in law or in the weighing of evidence, and these men sit amid surroundings not well adapted to the achieving of accurate results in such matters as these—surroundings not of books and of leisure, but of military cares, physical discomfort, and haste. In our Army the difficulties surrounding a court-martial have always been perceived; and, in consequence, the proceedings of a court-martial are, by our system of military law, inefficacious unless and until there is an approval by the authority appointing the court. Indeed, the court-martial itself—that is to say, the persons who are designated by the appointing authority, but who are commonly deemed the only members of the court—may not unreasonably be said to be treated by the law as no court at all, but as the equivalent of a commission making examinations and reporting recommendations. As the Articles of War of 1806 said (A. W. 65):

"No sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same or the officer commanding the troops for the time being."

The articles of war in the Revised Statutes (A. W. 104) are to the same effect, viz:

"No sentence of a court-martial shall be carried into execution until the whole proceedings shall have been approved by the officer ordering the court, or by the officer commanding for the time being."

The words in the present article of war are substantially the same (Art. 46):

"No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

7. To refine, one might say that the war court is composed of both the court-martial and the appointing authority or, conceivably, that it is composed of the appointing authority alone. To go into refinements is unnecessary. What is important is to notice that though the court-martial and the appointing authority undoubtedly constitute a tribunal as regular as any other known to the law and a tribunal both argumentatively and expressly recognized in the Constitution of the United States, nevertheless, the tribunal, in each of its parts, needs supplementing.

8. It has already been pointed out that the proceedings of the members who participate in the hearing need and receive investigation by the appointing authority. It must now be pointed out that the appointing authority, though certainly deserving high respect, can not be said to be ideal for the present purpose. The appointing authority is a busy military officer whose specialty is not the ascertaining of law and the weighing of evidence. Although he has the assistance of a department or division judge advocate, the surrounding circumstances are not perfect; and, hence, it is easy to believe that Congress contemplated as desirable a substantial power of revision to the end that the soldier may find himself dealt with as carefully and skillfully as is a civilian offender. Further, even though the appointing authority be expert and full of leisure, there is a substantial danger that the appointing authorities throughout

the Army will not bring to pass equivalent sentences for equivalent offenses, and that thus, taking a wide view of the whole Army, there may be such lack of uniformity as may amount to grave injustice.

9. Further, it must not be forgotten that military tribunals are administrative in their nature, and that when customs officers and other administrative officers rule upon rights—though merely rights of property—it is not uncommon to hear that due process of law requires an appeal—whether an appeal to the courts or merely an appeal to a superior officer.

10. These are reasons enough for expecting Congress to establish for military tribunals some sort of appellate precedure, bringing the whole matter ultimately before an expert.

11. Such considerations furnish the atmosphere surrounding the statute, and they show that one should receive with cordiality the provision that the Judge Advocate General shall "revise" the proceedings of all courts-martial.

12. Yet, is not the word "revise" clear? Does it not mean some active procedure by the Judge Advocate General, and some procedure regarding matters of consequence? Can the word mean that the Judge Advocate General is merely to correct spelling, punctuation, and grammar; and if he is to do something more than that, who shall say that he is to stop before he has done the whole of the task which the foregoing discussion has shown to be desirable?

13. The word "revise" is not a technical word of Anglo-American law. It is used now and then in statutes. The construction which has been given to it in statutes not dealing with military matters shows that as regards procedure the word "revise" or the word "revision" has a wide meaning. It is enough for the present purpose to notice what is the meaning given in military law to the word "revise" and to its related word "review." It will be found that the word "review" has a wide meaning in military law, and that the word "revise" has a still wider meaning. The power of the appointing authority, called in military books the reviewing authority, is thus described in the present article of war 47:

"The power to approve the sentence of a court-martial shall be held to include:

"(*a*) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

"(*b*) The power to approve or disapprove the whole or any part of the sentence."

14. Wide as is the power of the reviewing authority, the power of revision is still wider. When the reviewing authority refers the case to the court-martial for revision—though, to be sure, that procedure is not mentioned in the Articles of War, and now rests wholly on military custom—the power of revision is understood to include a change in the finding and in the sentence. This wide meaning of the word "revision" is described in all books on military law. It is enough to cite the books from the beginning of the nineteenth century to the year of the adoption of the statute in question. The citations are as follows: Tytler's Military Law, 1806 edition, pages 169 and 338; McCombs' Martial Law, 1809 edition, page 32; Duane's Military Dictionary, 1810 edition, page 600, under the word "revise"; Scott's Military Dictionary, 1864 edition, under the word "revision"; Benet's Military Law, 1868 edition, page 169.

15. In the light, then, of the circumstances and of military custom, the Judge Advocate General's power regarding the proceedings of courts-martial, as now given by the Revised Statutes through the word "revise," goes beyond the mere examining and filing which was the power before this statute was passed. It is not surprising to find that the statute used a word which enlarged the Judge Advocate General's power, for the statute itself recognizes that it enlarges the Judge Advocate General's duties, since it expressly says:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been heretofore performed by the Judge Advocate General of the Army."

EUGENE WAMBAUGH,
Major, J. A., O. R. C.,
Assistant to the Judge Advocate General.

DECEMBER 1, 1917.

ANSELL EXHIBIT F.

GENERAL CROWDER'S SECOND BRIEF IN OPPOSITION TO THE REVISORY POWER.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, December 17, 1919.

MY DEAR MR. SECRETARY: Herewith is Gen. Ansell's reply brief on the question of whether or not appellate power to revise, modify, and affirm findings and sentences of courts-martial is, by the terms of section 1199, Revised Statutes, vested in the Judge Advocate General of the Army.

You will recall that on November 10 Gen. Ansell submitted, for your personal consideration, a brief which purported to find in said section this appellate power in the Judge Advocate General. His conclusion was reached on five main points of argument:

(1) That the legislative history of the statute shows that the intent of Congress was to vest the Judge Advocate General with his power;

(2) That the administrative history of the statute disclosed that the power had been actually exercised by Judge Advocates General of the Army during the Civil War and until about 1882;

(3) That the word "revise" (which was the only word that could be considered as such a grant), as used in other statutes, specifically in the Federal bankruptcy statute, had been discussed by a United States court as having sufficient amplitude to convey appellate power;

(4) That the courts of the United States had never passed upon the power; and

(5) That the Judge Advocate General of the British Army is vested with an analogous power.

You passed Gen. Ansell's brief to me and asked me to submit to you my views.

I replied to each one of the foregoing propositions, in substance as follows:

(1) That the legislative history of the statute was without significant incident;

(2) That the records of the Judge Advocate General's Office showed no exercise of this power by Judge Advocates General; but, on the contrary, disclosed many instances where such power, if it existed, would have inevitably been exercised had it been contended for, but which was not exercised.

(3) That Mr. John Tweedale, chief clerk of the War Department, in 1882, had made an affidavit for use in the case of In re Mason, to the effect that he, as chief clerk, knew of no instance where the Judge Advocate General of the Army had in any official communication or report relative to the proceedings of general courts-martial, proceeded to act as an appellate judicial authority; but that his action was only to revise; in other words, to examine and make recommendations, either to the general of the Army, when that officer had appointed the court, or otherwise to the Secretary of War.

(4) That the word "revise" was not relied upon in the Federal bankruptcy act to confer appellate power, which power was granted in express terms elsewhere in the same section cited in Gen. Ansell's brief, and that in its commonly accepted definition the word "revise" did not import such a grant.

(5) That the United States Circuit Court for the Northern District of New York had considered the question almost in the precise terms in which it was presented for your consideration, and had explicitly denied that section 1199, Revised Statutes, granted any such power to the Judge Advocate General.

(6) Finally, that a study of the organization of the British Army disclosed that the judge advocate general of His Majesty's forces had not exercised such powers.

Gen. Ansell now submits to you, through me, a second brief, still contending for the same proposition. He first addressed himself to the evils he would remedy. He shows that a great number of officers, not familiar with court-martial procedure, have lately been included in the Army, and that there is danger of grave error in court-martial proceedings, even when reviewed by judge advocates and approved by duly constituted reviewing authorities. He shows that the exercise of the pardoning power is often not sufficient to restore an officer or a soldier, who has been wrongfully convicted, to his full rights. He argues very strongly from these premises that it is both expedient and necessary that some corrective power should exist which shall have the effect of nullifying even approved findings and sentences of courts-martial, and that we should not be remitted solely to the pardoning power to correct fatal errors

of courts-martial and reviewing authorities. He cites again the mutiny case, to which your attention has heretofore been called, as an example, and says, I think justly, that there are other cases, happening particularly since the outbreak of war, which demand the exercise of such corrective power; and down to this point I follow him with substantial concurrence without, however, being able to concur with him that this power has been granted to the Judge Advocate General by section 1199, Revised Statutes.

Gen. Ansell's argument presents, about as strongly as it could be presented, the necessity for an appellate power. But this question is not a new one. Whether such a power should be created and whether the service would gain or lose by such provision has been discussed in service literature since 1885; but never, so far as I can inform myself, has it been suggested in this prior discussion that this appellate power could be deduced from section 1199, Revised Statutes.

The lawyer's mind is not particularly shocked by the fact that there exists in military jurisprudence no court of appeal. The Supreme Court of the United States has held too often, and too clearly to require citation of authorities, that it is no objection to a grant of jurisdiction that the grant is original and also final; also that there is no constitutional or necessary right of appeal. There is, therefore, no fundamental reason why court-martial jurisdiction, as at present constituted, should be disturbed. The argument which has heretofore prevailed is that there are substantial reasons of expediency and good administration why it should not be disturbed. War is an emergency condition requiring a far more arbitrary control than peace. The fittest field of application for our penal code is the camp. Court-martial procedure, if it attain its primary end, discipline, must be simple, informal, and prompt. If, for example, all the findings and sentences of courts-martial in France must await finality until the records be sent to Washington, we shall create a situation very embarrassing to the success of our Armies. Such a proposition should hardly be seriously advanced, and it would be very difficult to defend on principle legislation providing appeal in some cases and denying it in others. Yet if we legislate at all on this subject we shall be given to the necessity of doing that very thing.

You have recently issued orders which will be corrective of some of the embarrassments referred to by Gen. Ansell, and I shall shortly submit for your consideration further orders which will, I think, carry corrective action still further and perhaps afford the measure of relief called for.

E. H. CROWDER,
Judge Advocate General.

The SECRETARY OF WAR.

ANSELL EXHIBIT G.

THE SECRETARY OF WAR'S RULING.

DECEMBER 28, 1917.

Memorandum for Maj. Gen. ENOCH H. CROWDER:

I have read with interest and close attention the vigorous brief of Gen. Ansell on the question as to whether or not appellate power to revise, modify, and affirm findings and sentences of court-martial is conferred upon the Judge Advocate General of the Army by section 1199 of the Revised Statutes.

It is impossible not to admire the earnestness and eloquence with which Gen. Ansell presents his view. For the most part, however, the argument runs to the necessity of the power rather than to its existence. It may very well be that this power should exist, either in the Judge Advocate General or in the Secretary of War, advised by the Judge Advocate General, but if I were asking Congress at this time to give that power, I should feel the necessity of so limiting the language of the donation as not to paralyze the disciplinary power of the commander in chief of the Expeditionary Forces who, it seems to me, is in a situation where grave consequences might be entailed by inconclusive action on his part.

Generally, the administration of justice is a compromise between speed and certainty. The close cases and majority-of-one decisions of our supreme courts would justify the belief that, if there were other courts more supreme in many of these cases different results might finally be obtained; and yet somewhere there has to be an end to litigation, and to that end, therefore, finality is always a question of judgment, resting in legislative discretion. There is nothing intrinsically abhorrent in the idea of finality in judgments of courts-martial

approved by the reviewing authority. Whether or not, however, injustices are likely to arise from such a course which would outweigh in gravity the delays necessary to perfect a complete review on appeal is a question about which differences of opinion may well exist.

These considerations have little to do with the immediate question, which is whether or not the use of the word "revise" is legally a donation of appellate jurisdiction. Gen. Ansell cites the act of July 17, 1862 (12 Stat., 598, p. 20 Ansell brief), as directing the return of records of courts-martial to the office of the Judge Advocate General for purposes of revision—on page 21 of his brief, he cites the act of 1864 (13 Stat., 145) generally to the same effect. It would be interesting to know whether summary execution of judgments of courts-martial was at that time also contained in the laws of war. Obviously, if such summary executions were authorized, the subsequent return of the record for revision could not be held to be for appellate review, since it would be a vain thing to review the record after the execution of judgment.

If the word "revise" is to be held to confer appellate jurisdiction, as distinguished from jurisdiction in error, what provision has been made for a retrial or trial de novo, for the summoning of witnesses, and for doing what justice may require in the case. For instance, a report may come to the Judge Advocate General's office which contains radical errors of law. Has the Judge Advocate General the right to set aside the proceedings and direct a new trial to be had before the same or a different court, or may he summon the parties before him with the necessary witnesses and become himself a court-martial, or is he remitted to a quashing of the whole proceedings and restoration of the defendants to their original status, protected from subsequent prosecution by the bar of former jeopardy? In other words, just what procedure is contemplated in the cases which Gen. Ansell has in mind?

I have not the facts in the mutiny cases in mind, but as I recall it, Gen. Ansell ordered the discharge of those convicted of this mutiny, and I assume he felt himself without power to direct the trial of the officer whose misconduct caused the offense. I presume he felt equally without power to examine into such minor derelictions as may have attended the conduct of the men tried for the mutiny, who, even though they may have been guiltless of mutiny, may yet have been derelict in other ways with regard to that incident, which a complete administration of justice could be in a position to take notice of.

I would be glad to have your views upon the two questions suggested here: (1) With regard to the coexistence of the power of summary execution with the power of revision in 1862 and 1864, and (2) The sort of appellate procedure involved in the power to revise, according to the view accepted by Gen. Ansell and his associates.

I am not undertaking to decide this question at this time, but I would be glad to have the further orders to which your memorandum of December 17 refers brought to my attention as early as possible, with your own recommendations as to how far we should go in this matter by executive order, and to what extent legislating redress should be sought.

I am sure that you and I both sympathize with Gen. Ansell's main purpose, which is to establish such processes as will throw around every man in the Army, whether private or officer, the surest safeguards and protections which can be devised against either error of law or passion or mistake of judgment at the hands of those who try him for offenses involving either his property, his honor, or his life.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

ANSELL EXHIBIT H.

GEN. ANSELL'S MEMORANDUM RECOMMENDING THE ESTABLISHMENT OF A REVIEWING OFFICER IN FRANCE.

OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, December 22, 1917.

Memorandum for the Judge Advocate General.
Subject: Certain administrative measures affecting justice and discipline in the Army.

1. It is my judgment that you should give immediate consideration to the following matters:

(*a*) Regardless of your views or mine upon the question of the revisory power of this office, orderly administration as well as justice requires that sentences of death and sentences resulting, if executed, in immediate expulsion from the Army, should not be executed until the proceedings may be reviewed for prejudicial error by an officer of and representing this bureau, and not of the administrative staff and representing the officer ordering the court and his power. In order that there might be no delay in such review of proceedings, reviewing authorities should be instructed to forward to the reviewing officer of this bureau all proceedings without a moment of delay.

(*b*) The above consideration would require the establishment in France of such a reviewing officer, with duties as indicated. This administrative method would involve nothing of inhibited delegation of power. Assuming, as I have held, that the revisory power is in the Judge Advocate General of the Army, it is not necessary as a matter of law, as indeed it is not practicable as a matter of fact, that that officer function personally in each case. The function is a function of office; the statute originally establishing the Bureau of Military Justice clearly so indicated, provided for assistants and empowered them, in effect, to perform the duty, under the general supervision, of course, of the head of the office.

* * * * * * *

S. T. ANSELL.

ANSELL EXHIBIT I.

MEMORANDUM IN SUPPORT OF AN EXTENSION OF THE PROPOSED ADMINISTRATIVE REMEDY AND THE ESTABLISHMENT OF A REVISORY AUTHORITY IN FRANCE.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 9, 1917.

Memorandum for Gen. CROWDER.
Subject: Revision of court-martial proceedings.

1. I have just been advised of the step taken by the Secretary of War to prevent the execution of possible illegal death sentences in the United States by requiring that the record be transmitted to the department and reviewed here, that its legal correctness may be assured before execution. While a step in the right direction, I deem it my duty to say that in my judgment it falls short of the requisite degree of remediality in that it is not applicable generally nor to all those sentences which, unless stayed, mean separation of a man from the Army and placing him, in a practical sense, beyond the reach of remedial power subsequently exerted.

2. I see no reason why the same measure of relief should not be extended to dismissal and dishonorable discharge; nor do I see any reason why it should not be made applicable to our forces in France, as well as elsewhere; all of which could, with the establishment of a proper and practical system of revision, be done without evil administrative result and to the advantage of law and justice .

3. This would require the establishment in France of an office representing the functions of the Judge Advocate General, the duties of which would be practically those defined in G. O. 230, July 10, 1864, establishing such reviewing office in Louisville. For your information, I quote that order.

"I, Col. William M. Dunn, Assistant Judge Advocate General, will take post at Louisville, Ky., at which place the office of Assistant Judge Advocate General is hereby established.

"All records of court martial and military commissions which are required by Regulations to be forwarded to the Judge Advocate General, will be sent by officers ordering such courts or commissions within the military departments of the Ohio, the Tennessee, the Cumberland, and Missouri, Arkansas, and Kansas to the Assistant Judge Advocate General, at Louisville.

"With reference to records of courts and commissions it will be the duty of the Assistant Judge Advocate General to call for such as are not forwarded in due season, to examine them, to return for correction such as are incomplete, and to give immediate notice of fatal defects to the proper commander, that sentences may not be illegally executed. He will forward all complete records to the Judge Advocate General, but will not be expected to prepare reports on them unless specially instructed to that effect by the Judge Advocate General.

"II. The Assistant Judge Advocate General will be allowed the number of rooms as office, and fuel therefor, assigned to an Assistant Quartermaster General in paragraph 1068 General Regulations.

"By order of the Secretary of War:

"E. D. TOWNSEND,
"*Assistant Adjutant General.*"

Such an office located conveniently to our general headquarters, could give that thorough, disinterested, and judicial review of such sentences necessary to assure their correctness without considerable or injurious delay.

4. The review of all cases including those which carry sentences separating a man entirely from the service, should be expeditious—not so much that punishment shall be swift as that injustice be not suffered. The power of revision should not be limited to approval or disapproval, but should include all powers possessed by reviewing authorities. When I wrote the original opinion upon the subject I had several of the assistants suggest regulation to govern the exercise of such power and it was then generally agreed that—

"1. The power of revision shall not include the power to deal with the case before the officer appointing the tribunal has finally dealt with it, nor the power to admit new evidence or otherwise retry the facts.

"2. It shall be confined to a review of errors of law injuriously affecting the substantial rights of the accused, and as thus confined and for the limited purpose of corrections such errors of law it shall include—

"(*a*) The power to declare a proceeding, finding, or sentence void for want of jurisdiction.

"(*b*) To disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when the evidence of record requires a finding of only the lesser degree of guilt.

"(*c*) To disapprove the whole or any part of any sentence.

"(*d*) Such other revisory power not exceeding the general scope and purpose herein prescribed as may be found necessary for the correction of such errors.

"3. In a case in which such power is inadequate for the correction of such errors the power shall include the right to return the record to the proper authority that the tribunal may make the necessary revision, or to transmit it to the Secretary of War with a recommendation for a proper exercise of the pardoning power."

5. I think no doubt need be entertained but that such a system of revision would be workable, nor is it of more than academic interest to determine whether the power finds its source in the inherent relation of the President to the Army, or in the statutory donation of Article 38, or in the revisory functions of the Judge Advocate General established by section 1199, Revised Statutes, though, of course, I think it is clearly established in the latter section and not otherwise.

S. T. ANSELL.

ANSELL EXHIBIT J.

GEN. ANSELL'S MEMORANDUM COMMENTING UPON THE PROPOSED ADMINISTRATIVE REMEDY.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 12, 1918.

Memorandum for Gen. CROWDER:

1. You want my views upon Maj. Davis's proposed rule of procedure.

(*a*) It is, if legally correct, a step—though a weak and uncertain step—in the right direction, in that it gives large partial recognition to the existence of a power somewhere which will prove helpful and salutary.

(*b*) It is faulty as a definition of revisory power, in that it regards that power as having application only to that very limited number of cases in which sentences should be stayed.

(*c*) Above all, however, it is, I regret to say, fundamentally wrong as a mater of law. The theory is for the reviewing authority to approve the judgment but suspend its execution until he can be advised of the correctness of the judgment itself; and if advised of its incorrectness, then to revise it him-

self. Having once approved the judgment, it passes beyond his power to amend, and such power of amendment, if it exists, must be found elsewhere. On the other hand, if the stay of execution affects the judgment itself and makes it conditional, or holds it in gremio legis, as it were, awaiting further action by the reviewing authority, then it is not final and can not be revised here at all. If the reviewing authority does not take final action, there is nothing for this department to revise. If he does take final action, then the judgment passes beyond his power to revise. Take those sentences revised in this office in due course and without stay, which will constitute the great majority of cases. In such cases the action of the reviewing authority is unquestionably final; and if there is to be revision of the judgment at all, it concededly must be done by some authority other than the reviewing authority. In such cases surely the department would have to exercise the power. Viewed from whatever angle, it is perfectly apparent that the source of the authority is in this department and must be exercised by this department, if exercised at all. No system can be devised whereby the convening authority revises his own judgment at the mere suggestion of this department.

(*d*) The rule, even if it were unquestioned as a matter of law, is contrary to all administrative principle. The corrections to be made are corrections of errors of law discovered upon review here. What reason can there be to require this office to review for errors of law and then be denied the power of correction? In any system of law jurisdictions must be defined. Powers must be located, and they must be powers, not requests. If left undefined, or resting upon mere comity, the system is not likely to stand. The test would come sooner or later, after perhaps a multitude of disagreements. It adds to the administrative burden and the time required to finalize a judgment.

2. I wish I could give concurrence to something which, though less than the full power, would be satisfactory to you and to the Secretary of War, and would serve, at the same time, as a partial remedy. I can not. I may be permited to say, however, that the limitations which the rule seeks to place upon the exercise of revisory power doubtless have their origin in a fear of the consequence of a full exercise of that power. Not sharing that fear, I can not sympathize with the limitation. Even if I could agree, as I can not, that such limitation has a basis in law, the power, if it exists at all, should be exercised in full. Otherwise, it should be entirely denied. Safety lies in taking one course or the other, and not in a compromise.

3. I have given this question of revisory power the best that is in me. I see no reason whatever to hesitate at the adoption of that definition of revisory jurisdiction which is found in my recent memorandum and which was adopted after most thorough consideration upon the part of many of the assistants of this office as what the law requires. I do not believe, as much as I should like to believe, that what Maj. Davis proposed is sound in law or will prove safe in practice. I regret, therefore that I can not advise you to adopt it.

S. T. ANSELL.

Mr. ANSELL. The War Department disagreed with my view, they adhering to the opposite theory, that these courts are such agencies, have such a relation to the military commander, that when he once puts his stamp of approval on what they do, it passes beyond all corrective power.

There occurred, however, a rather tragic case, contemporaneously with the pendency of these two views in the department, and that case occurred in the very department that the mutiny case had occurred in, and will show you what I consider the chief defect among many great defects of the existing system. There had been a terrible crime committed on our border in Texas by negro soldiers, and those men had been tried for that crime, and, I say, while this difference of view was pending for solution before the department, we were acquainted by the press one morning with the fact that these soldiers had been executed, before we had heard of it or had received the record, notwithstanding the law provides that the proceedings must be sent to the office of the Judge Advocate General for revision.

My understanding of that case is that the portion of the official record completed daily was passed by the judge advocate of the court to the convening authority—the major general commanding that department—who looked over it daily as he received it, and when he had received the last day's record, why, he considered that he had reviewed the case. It met with his approval, and within a short time thereafter, either the next morning or the next day after the last day of the trial, these soldiers, numbering a dozen or more, were executed, leaving the Judge Advocate General of the Army to perform whatever functions he had under section 1199 of the Revised Statutes some four months after these soldiers had been buried.

That occurred to me as a useless and futile proceeding, certainly doing the condemned men little good on this earth.

Senator CHAMBERLAIN. These men in this case had been executed before the Judge Advocate General acted?

Mr. ANSELL. They had been executed before the records had been dispatched from the office of the department commander. The records were not received in the office of the Judge Advocate General until some three or four months after the soldiers had been hanged.

Now, I am not saying but that the record justified the execution of those soldiers; that is not my point. I have never examined the record myself. But the time to determine whether the record justified the execution, was before the men were executed. But, above all, whether the execution was later found to have been justified or not, if the authorities here had any statutory duty to perform in the premises, how could they effectively perform that duty?

To show you that we did move forward, in spite of the rather crystallized static views of the War Department during the war, afterwards there arose what might be called a companion case to these cases to which I have just referred. I refer to the Rockford cases of rape.

Senator LENROOT. Where was this?

Mr. ANSELL. At Rockford, Illinois. The military authorities there apparently were desirous of taking the same expeditious course in the cases of those soldiers, and besought the office of the Judge Advocate General under General Order No. 7 to make a very expeditious review of those cases in order that there might be another very expeditious expiation of the offense. I said that there would not be that kind of an examination. If there was any duty imposed on our office under the law—it would be performed in a legal, and as far as possible thoroughgoing, way. Without going into that record it is sufficient to say that under the ruling made by me we did set aside that entire proceeding, and we did order a new trial—that is, the President did, upon my advice—and the men have been retried, with what result I do not know. I will prophesy that some of them will be acquitted on a fair trial. But that case is, to my mind, illustrative of what can happen under this system, under the theory that a court-martial is an emergent, exigent court or agency.

Senator LENROOT. Do I understand that the department has reversed its view in regard to courts-martial?

Mr. ANSELL. The department has at times modified its views. It modified its views, Mr. Chairman, when, as a result of my insistence

that executions such as those that occurred in Texas ought to be suspended, at least until somebody up here could review that record, they assumed power, notwithstanding their proposition that the commanding general's power was absolute and not subject to any superior's demands or commands, to issue what is known as General Order No. 7, which was a general order published by the War Department to the effect that, notwithstanding this supreme power of a commanding general to execute these sentences of which he was the final arbiter, nevertheless in all sentences of death, the execution of which placed the victim beyond curative action, the commanding general would suspend his authority until after he had been advised by the War Department.

Senator CHAMBERLAIN. That is only in cases of death sentences?

Mr. ANSELL. Of death sentences; later amended, at my insistence, to include sentences of dishonorable discharge and dismissal from the Army. See Exhibit I.

Senator LENROOT. In the Rockford case, in which I think you said the President ordered a new trial, was that in the form of a formal order or in the form of advice to the commanding general?

Mr. ANSELL. That was in a formal order with respect to certain cases that had to come to him for confirmation anyway. In certain few cases sentences have to be confirmed by him; and my recollection is that in the other cases, not of sentences of death but of long terms of imprisonment, in the same case, as to codefendants, he directed—I think the language would justify that term—the commanding general there to have a new trial.

It ought to be said here that the War Department, quite inconsistently, I think, had assumed the power from somewhere to set aside judgments of courts-martial where the department could say that the court was entirely without jurisdiction, and the judgment was entirely void—not voidable because of error, but void; not reversible, but absolutely void—and said that in those few cases they would undertake to set aside the judgment; denying themselves, at the same time, however, the power to review the judgments of courts-martial for errors of law that rendered the judgment illegal.

Senator LENROOT. Do you think that is an inconsistent position?

Mr. ANSELL. Yes, I think it is very inconsistent.

Senator LENROOT. In one case there would be no court-martial at all; it would be entirely without the law.

Mr. ANSELL. But who can say that a thing is entirely *coram non judice?* Can one at will dispute the judgment of a court on the ground that it has not jurisdiction? It requires judicial determination. Of course, if the court has not jurisdiction, its proceedings can be attacked collaterally; but judicially, all the same. It is an exercise of a revisory power, to declare a judgment null and void.

Senator CHAMBERLAIN. Where did they claim to get that authority?

Mr. ANSELL. Nobody has ever known.

Senator CHAMBERLAIN. It must be from section 1199 of the Revised Statutes.

Mr. ANSELL. It ought to be. I do not know. I have asked that. Certainly I would not have allowed that question to pass unexpressed.

Senator CHAMBERLAIN. It gives a power to revise; that is, a power to set aside.

Mr. ANSELL. I think my brief, if the gentlemen of the committee are interested in it, will set forth clearly and fully my views, and I assume that the briefs on the other side will set forth clearly and fully the opposite views. I only call your attention to the fact that the War Department would stay its hand in a case where they could say that the court was without jurisdiction. In other words, they necessarily would exercise some supervisory jurisdiction over courts-martial.

Senator CHAMBERLAIN. But they did not exercise that same power where there was no evidence to sustain a judgment?

Mr. ANSELL. No, sir. I have tried to do justice by calling much error jurisdictional error. For instance, I have held in some flagrant cases—and I think I would be backed by authority in doing so—that notwithstanding the fact that the accused nominally had counsel, if that counsel were so incompetent that by reason of that the man did not get a fair trial, that his defense was not presented, he was denied the substantial right of counsel. If in such cases the commanding officer details a man whom he designates as counsel, but the man performs none of the duties, and whatever he does perform is injurious to the case of his client, I would say in that case that the accused had been denied the substantial right to the assistance of counsel. Now, if a man is denied, by administration of the court, this great right, in my judgment it is tenable to say that that court becomes deprived of jurisdiction from that moment on. It may be disputable, but I would hold so; certainly in our situation, where no other means could be employed for correction of that judgment.

Let us take, for instance, the case that I have called the companion case to the cases in Texas. You saw that the soldiers in Texas were hanged before the War Department even knew, officially, of the trial; that is, before the records were received at the department. But we exercised the supervisory power to stay the hand of the commanding general by law until we could look at the record in these Rockford cases, in my judgment a partial exercise of this very power that I contended for. If an appellate court should undertake to order an inferior court to stay its judgment, or issue a supersedeas to that court, it would surely be exercising a revisory, supervisory, or appellate power by so doing.

I mention these cases because they are analogous; they are companion cases. One of them marked the beginning of the war, and the other nearly the ending of the war.

In the one case a great number of soldiers were hanged before their cases had been reviewed. In the other case the military authorities wished to hang a great number of soldiers upon a very expeditious review of their cases, which review would not have taken place at all except for this partial exercise of this appellate or revisory power. In that case some twenty-odd men were to be tried jointly for the single alleged offense of rape. Counsel was notified by the commanding officer on Saturday afternoon at 3 o'clock, over the telephone, that he was to perform the duties of counsel for all these men; on Sunday at noon the court convened and proceeded with the trial of these cases; and at the convention of

the court, as I understand it, for the first time counsel was advised of the charge and furnished copies of the charges; they were proceeding to a summary trial of twenty-odd men jointly charged with a capital offense. Counsel moved, naturally, properly, for a continuance, that he might prepare his defense. "Not granted"; on the ground that the division was needed in France, that it soon had to go, and it would be very embarrassing, administratively, to have any delay in this case; and the commanding general had communicated his desire to the court that it should proceed forthwith to a trial and conclusion of the case; therefore the motion for the continuance was denied.

The first session of the court lasted until well after midnight on Sunday night, so that counsel had no time whatever to prepare. And then, as might have been expected in these cases, there were variant defenses, of course, and conflicting defenses, and we had the situation of a single counsel undertaking to represent these codefendants who were presenting conflicting defenses. We had there the spectacle of a counsel cross-examining his own client, for instance, as must be the case where such conflicting defenses are presented by single counsel.

Every error in the calendar of errors was unquestionably committed in that trial; and yet, without this power to review that proceeding, the result must, of course, have been in accordance with the sentence—death for these men.

Senator CHAMBERLAIN. Were they convicted?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. And it was approved by the commanding officer?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. And then it reached the Judge Advocate General?

Mr. ANSELL. Yes; and it was set aside. And nobody could have done otherwise—no lawyer.

Senator CHAMBERLAIN. It was not for lack of jurisdiction?

Mr. ANSELL. In order that I might be on the safe side, I held that the error was annihilating as well as simply reversible. I said that when men were railroaded—using, of course, language that was more judicial than that—as these were; when men had no counsel, as these had not—referring, of course, not to the competency of the counsel, but the situation in which he found himself—that the court was ousted of its jurisdiction from that point on, and its proceeding was not a trial at all. I said that these and other numerous errors were so fundamental as to annihilate the judgment, presenting a case for the civil judiciary to take a hand in, if it chose, by way of habeas corpus.

But I said even if it should be held that this error was not annihilating error, it was clearly such as to require a reversal of that judgment, and in such a case the power to reverse ought to be excised, and surely the power to reverse included the power to order a new trial. I put it up on both points.

Senator LENROOT. Have you any precedent where a court having once acquired jurisdiction it was held that it should be ousted from its jurisdiction because of conduct during the trial?

Mr. ANSELL. Yes; I have had occasion to brief that question. Without referring to the authorities now, because I am not sufficiently familiar with them, I will say they exist. If a mob, for instance, should take charge of the court room, I presume that nobody would doubt that that court ceased to be a court from that moment. I should say that, notwithstanding an arraignment, and not disputing the attachment of jurisdiction originally, and not disputing the general jurisdiction of the court to try the case, if the court should deliberately say, "You shall not have counsel," there a fundamental right of that man is denied. If the court should proceed after that—I am not referring merely to the failure to grant a continuance, which lies within the jurisdiction of the court, but to the flagrant denial of the right to have counsel, or the flagrant denial of a man's right to witness under the law and the Constitution—it would thereafter proceed without jurisdiction. I think we have many cases of that kind.

My understanding is that if during the progress of the trial what may be defined to be a fundamental or constitutional right of the man on trial, be denied him by the court, that error may become annihilating error to which habeas corpus might lie. Naturally the court would not lean to declaring it to be such a denial of justice as to work an ouster of jurisdiction except in the most flagrant instances of violation of constitutional provisions designed to protect the rights of a man throughout the trial. If, for instance, he were excluded from the court room during the trial of a felony—excluded by the power of the court, and unlawfully so—I presume that that would work an ouster of jurisdiction.

There are, I assure you, many cases where it has been held that a criminal court may so conduct itself as to deprive a man of a constitutional right of protection during the progress of the trial, resulting in annihilating error; not mere error or law, but an error in regard to a fundamental right, rendering the judgment void.

Senator LENROOT. Yes; I understand that; but I was not aware of the fact that it would go to the extent of an ouster of jurisdiction. But that is neither here nor there.

Mr. ANSELL. Of course that question, as I recollect, was brought up in the Frank case. It would have been conceded there, I suppose, that if mob rule had dominated the proceedings, the proceedings would have been proceedings beyond the proper jurisdiction of the court.

Senator LENROOT. I think the court would have ceased to exist, in that case.

Mr. ANSELL. Of course I do not mean physical displacement of the court. I do not think that would be required.

Well, in any event, the situation when this war began was this: No matter how illegal the judgment, it could not be reviewed. I myself believe if we could have established any revisory power, the exercise of that power, and the incidental power to issue rules and orders requiring the courts to keep within reasonable legal limits, would have gone far to prevent and correct what I call the gross injustice due to court-martial procedure during this war. Whether all will agree with me that there has been such gross injustice, I know not. It seems to me to be now a fact well established. I am

satisfied of it. But if we could have established this power there would have been much less of it, because these courts would have been controlled by principles of law instead of by the arbitrary power of military command.

You gentlemen have a bill before you the origin of which is, briefly, this: These gross injustices could not be kept inarticulate even during the war. Complaints were made to Congressmen, to me, and to others. Finally those complaints found congressional expression through the then chairman of this Committee on Military Affairs, and a bill was introduced by him the chief purpose of which, as I recall it, was to establish beyond any dispute this revisory power, and otherwise to subject the power of military command, in its relation to court-martial procedure, to government by legal principles. When that Congress was about to expire and the bill had not been passed, I was asked by the chairman of the Committee on Military Affairs to draft a bill expressive of my views, and what seemed in a large way to be his; and I was subsequently asked by the Secretary of War, in an era of good feeling, to do the same thing.

On April 2, having been invited by the Secretary of War to express my views suggesting remedies for the existing court-martial system, I communicated with the Secretary of War as follows, indicating what I believe to be the defects of the existing system, and enunciating the principles upon which the bill before you is based. [Reading:]

[First indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
April 2, 1919.

TO THE ADJUTANT GENERAL

(Through military channels; for consideration by the Secretary of War):

I. Availing myself of the authority of the above memorandum, I will state here briefly my observations, as they may be found in various memoranda and statements of mine within the department, concerning the deficiencies of the existing system of military justice:

(*a*) First, speaking generally, and of vices which in my judgment destroy every assurance of justice:

(1) The laws of Congress of an organic character should accord with and proceed in furtherance of the fundamental theory that courts-martial are inherently courts, their functions inherently judicial, and their powers must be judicially exercised; and such laws should, under penalty if need be, forbid the department and the Army to disregard the sacred character of these judicial duties and functions.

(2) Organic statute should require that the system be law-controlled, and not controlled as it now is by men, and military men at that, whose training is rather away from judicial appreciations.

(3) Organic law should require that the fundamental rights of an accused, declared in our bill of rights, be recognized and protected throughout the proceeding.

(4) Organic law should abolish the do-as-you-please character of this penal code. Please look at the 42 punitive articles and you will observe that they neither define the offense nor the penalty. In every article the offense is to be punished "as the court-martial may direct" or "with death or as the court-martial may direct" or "with death." Congress tells the courts to do as they please. Such delegations of penal power are intolerable.

(5) Such legislative delegations and legislative indefiniteness are invitations to military authorities, from the President down, to take unrestrained action in specific cases and to resort to mere administrative palliatives to meet a general situation. Administrative expedients which, whether good or bad, may be undone as easily and by the same authority as they were done, should not be accepted as remedies for fixed perversions of military justice;

for these can never be corrected within the department within which they arise and by which they are warmly supported.

(6) Such lack of legal control, with the corresponding subjection of judicial functions to the will of military authority, has led to an Army attitude of mind which is intolerant of those methods and processes which are necessary to justice.

(7) Organic law should restrain commanding officers in their altogether too frequent resort to court-martial in general and their too frequent reference to a general court of trivial charges which ought not to be tried at all, or tried by an inferior court, and not referred to a general court with its unlimited power of punishment, and the statutes should compel, by applying penalties if need be, a recognition of the substantial rights of an accused at every stage of the proceeding.

(*b*) The statute should require that no charge be referred to any inferior court-martial until the commanding officer convening the court shall have made a thorough investigation of the charge and make minutes of the evidence, or shall have had an especially qualified officer to do the same for him, nor until he shall have certified that, in his judgment, the case can not be properly disposed of without trial by court-martial.

(*c*) The statute should require that no charge shall be referred to a general court-martial for trial until after the judge advocate on the staff of the convening authority shall have certified on the charge that the papers show that a thorough investigation has been made and that, in his opinion, the charge sufficiently alleges an offense triable by court-martial, and that the evidence is prima facie sufficient to sustain the charge.

(*d*) The statute should abolish the present position of judge advocate as a prosecutor, and should require the assignment of a specially qualified officer to prosecute in the name of the United States.

(*e*) The statute should make it mandatory that an accused should have military counsel before special and general courts-martial, and authorize him to have civil counsel; and the officer convening the court should be required to assign as military counsel the officer selected by the accused, and in case the accused makes no choice should be required to certify for the benefit of the record that he has assigned to that duty that officer within his command whom, by reason of legal qualification, experience, and rank, he deems best qualified therefor.

(*f*) The statute should require that an officer of the Judge Advocate General's Department should be assigned to sit with every general court-martial, and should empower him to rule upon all questions of law raised during the proceeding, to sum up the evidence for the court, and to perform generally those functions which are usually performed by a judge sitting with a jury in the trial of a criminal case; and the statute should also require that wherever practicable a specially qualified officer be detailed to sit as a law-member of a special court-martial.

(*g*) The statute should require that the court and the judge advocate shall function independently of the convening or any other authority, and it should forbid the convening or any other authority to return to the court any record for reconsideration, except for such reconsideration as must operate to the benefit of the accused. The statute should forbid any reconsideration that could result in the changnig of a finding of not guilty to one of guilty of any offense, or changing a finding of guilty of a lesser included offense only to a finding of guilty of an offense of higher degree or of a different offense, or increasing the punishment.

(*h*) The statute should require that the convening authority take no action upon the proceedings of a general court-martial until he shall have had the views of his judge advocate thereon in writing, and no convening authority shall approve any proceeding or sentence of a court-martial pronounced illegal or void by his judge advocate.

(*i*) The statute should place beyond question the revisory power of the Judge Advocate General of the Army, who should be specifically authorized upon a question of law raised (1) to pronounce the proceedings, findings of guilty, or sentence, in whole or in part, invalid; (2) and in a proper case to recommend to the proper convening authoritties that a new trial may be had.

(*j*) The statute should make offenses and penalties more nearly specific.

(*k*) The statute should so establish the office and duties of the Judge Advocate General that in their performance he shall not be subjected directly or indirectly to military supervision of any kind, but kept free from that military influence which I regard as offensive to justice.

II. In addition, I respectfully ask you to reconsider your refusal to receive my communication officially, and give it the same publicity you gave the statement of Gen. Crowder and your own letter in support of the existing system. The reason specifically assigned by you is that it involves a personal controversy between me and Gen. Crowder, and that, therefore, it is "obviously useless and improper for publication." I ask your reconsideration on these specific grounds:

(*a*) The controversy is personal only in the sense that it involves the views and attitude of that officer and myself upon the existing system of military justice. You wished that the people be acquainted with, in order that they might be reassured by, his views and his attitude in support of the system; my statement is designed, in part, to show that the views and the attitude of that officer are not of such credible and bona fide character as to convey any such assurance, and that they would not convey such assurance if their character were understood. Unless my statement is published, the people will not be in a position to judge whether or not the information contained in Gen. Crowder's statement is worthy of public credit.

(*b*) As a matter of common fairness, inasmuch as you published Gen. Crowder's aspersions upon me in a statement which you invited him to make and then made public, you should not deny me but accord me my right of defense before the same public forum.

S. T. ANSELL,
Lieutenant Colonel, Judge Advocate.

The Secretary of War, notwithstanding the fact that in the morning press we find evidence that now he is of an entirely different state of mind, replied to that memorandum as follows.

Senator CHAMBERLAIN. Under what date?

Mr. ANSELL. Under date of April 5. [Reading:]

WAR DEPARTMENT,
THE ADJUTANT GENERAL'S OFFICE,
Washington, April 5, 1919.

From: The Adjutant General of the Army.
To: Lieut. Col. S. T. Ansell, Judge Advocate.
Subject: Indorsement of April 2.

The Secretary of War acknowledges the receipt, through military channels, of the first paragraph of the indorsement made by Lieut. Col. Ansell, under date of April 2, dealing with the subject of proposed changes in the system of military justice. The suggestions made by Lieut. Col. Ansell are entirely appropriate in form and substance and merit earnest consideration, which they will receive. With many of the suggestions the Secretary of War finds himself in hearty concurrence, if, in fact existing statute law is defective in the particulars suggested by the proposed changes. In order that the subject may be fully considered and the views of Lieut. Col. Ansell adequately studied, it is directed that Lieut. Col. Ansell prepare and submit to the Secretary of War at the earliest possible date a draft of such a bill as in his opinion would be adapted to carry into effect the ideas expressed in the first paragraph of his indorsement.

Now, coming down, as I presume logically we ought to come down, to discuss the vices of the existing law, I would like to state those vices as I see them, as I have observed them, under the following propositions.

Senator CHAMBERLAIN. May I ask whether you submitted to the Secretary of War a draft of a bill?

Mr. ANSELL. I did; which is the bill that you have here.

Senator CHAMBERLAIN. Have you ever gotten a reply from him?

Mr. ANSELL. I have not.

The following propositions present the vices of this system:

1. Our code of military justice (technically known as the Articles of War, section 1342 of the Revised Statutes as amended), is thoroughly archaic. It is substantially the British code of 1774, which code was itself of much more ancient origin.

2. The so-called revision of 1916 was but a slight verbal revision, and made not a single systematic or substantial change; and such changes as were introduced but accentuated the vicious principles underlying the code.

3. Our code is a vicious anachronism among our institutions, coming to us, as it did, out of an age and a system of government which we properly regard as intolerable.

4. It came to us through a witless adoption, and our interests in, appreciation of, and attitude toward military matters have never been such as to lead to any systematic change or to any thorough congressional investigation or other fair inquiry into its utter inadaptability to our conditions.

5. The hearings held upon that revision demonstrated that committees of Congress are not well advised when, in investigating military matters of this kind that involve the citizen and his rights when he becomes a soldier, they confine their sources of information to the War Department and the Army.

6. Our code is in sharp conflict with these principles of government, which, in my judgment, our Constitution evidently contemplated should apply to our Army.

7. It is in equally sharp conflict with any adequate military policy that is consistent with the principles of this Government. In my judgment an army of citizens can never again be subjected to such an ill-suited system.

8. The code is not a code of law; it is not buttressed in law, nor are legal conclusions its objective. The courts applying it are only agencies of military command, not courts of law; their proceedings are not regulated by law; their findings are not judgments of law.

9. Setting up and recognizing no legal standards, no lawyers, no judges—in a word, being lawless—it contemplates no errors of law and makes no provisions for their detection or correction.

10. Military autocracy is the frankly expressed fundamental theory of our code. By it our soldiery is governed not by law but by the unregulated will of a military commander. It is, in its entirety, a government by man and not by law. No finer example of such is to be found in any modern government.

11. By the adoption of this code Congress abdicated its constitutional prerogative to make the rules for the discipline of the Army, has authorized military command to make those rules and to do as it pleases in applying them, restrained by no law, no judge. The Judge Advocate General of the Army and his office, the head of the Bureau of Military Justice, the only lawyer and the only legal establishment contemplated by the law of Congress, are by the laws of Congress made expressly subject to the "supervision" and control of the highest military authority, the Chief of Staff of the Army.

12. The result has been, as when men are subjected to the power of other men unregulated by law the result must ever be, a large measure of oppression, gross injustice, and discipline through terrorization.

13. Notwithstanding the tenacious adherence of our War Department to the existing system, it may be well for us to remember that even in times past it has been the subject of criticism of those of

our most distinguished soldiers who have studied it—among whom may be mentioned Sherman, Fry, and Lee and the other leaders of the Confederacy—to the effect that it is a system unsuited to our armies.

Now, I presume that going over this may be rather tiresome to the committee. I do not know whether it is as old a story to them as it is to me, but I would like to take up these points, if I might, and develop them as best I can.

Senator LENROOT. Yes; certainly.

Mr. ANSELL. We, of course, while we were British colonies, had the law of the motherland, including the law military; though it ought to be said, because I think it is somewhat significant, that the colonies of that day, before the Revolution, governed their armies, their provincial troops, by a rather different and more liberal local system, which nevertheless regarded the British articles of war, doubtless, as their pattern.

When we came to the Revolution the State levies or quotas were each governed by their local laws.

In the beginning, the Continental Army, of course, had to be governed as best it could by our generals through their knowledge of the only systems they knew—the British system, and the differing local military codes.

Early in the war communications went from Gen. Washington to the Continential Congress to the effect that discipline was unsatisfactory—due largely, doubtless, to the fact that the Continental Congress had not legislated on the subject, that there was not a single code—and that generally the situation was unsatisfactory and something had to be done. This communication came to the attention of Mr. Adams and Mr. Jefferson, the communication having come from Gen. Washington through his judge advocate general. Doubtless the Congress was very much exercised, and these two leaders certainly were, and they resolved that something should be done immediately. Mr. Adams took charge, and I think what happened can be as well described in his own words as in anybody else's. He said:

> There was extant, I observed, one system of articles of war which had carried two empires to the head of mankind, the Roman and the British, for the British articles of war are only a literal translation of the Roman. It would be vain for us to seek in our own invention or the records of warlike nations for a more complete system of military discipline. I was, therefore, for reporting the British articles of war totidem verbis. * * * So undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause that to this day I scarcely know how it was possible that these articles could have been carried. They were adopted, however, and they have governed our armies with little variation to this day. (History of the adoption of the British articles of 1774 by the Continental Congress; Life and Works of John Adams, vol. 3, pp. 68–82.)

He indicates that Mr. Jefferson, though appreciating the necessity for doing something, and apparently having pledged himself to help Mr. Adams to see it done, did not well toe the scratch when the moment for performance came. Mr. Adams, himself, said:

> It was a very difficult and unpopular subject, and I observed to Jefferson that whatever alteration we should report with the least energy in it or the least tendency to a necessary discipline of the Army would be opposed with as much vehemence as if it were the most perfect; we might as well, therefore, report the complete system at once and let it meet its fate. Something perhaps might be gained.

Afterwards he said that he was really surprised that such a stiff system of discipline should have passed so easily. There may have been a legislative situation that permitted them to put it through with none too much comprehension, for it was put through very rapidly, word for word with the old British code of 1774.

Now, I contend that we have still got the British code of 1774, and I believe that if there is any one thing demonstrable in law it is this thing; it can be shown conclusively by comparing our present-day articles of war, which is the best proof, although requiring considerable time, with the articles of 1774; it can be shown historically by the most eminent writers on military law, the most eminent being Winthrop; it can be shown, indeed it is conceded by all, including the Judge Advocate General, that unless the revision of 1916 changed the code of 1774 then we still have the code of 1774.

There was the "Crowder revision" in 1916, but revisions are of two kinds. The revision of 1916 did strike out some archaic language, it did dress up the articles in language a little more modern than that of Rome or Gustavus Adolphus, or of England of 200 years ago, retaining, however, much of the archaic language but retaining all of the system and all of the substance.

All military writers on the subject—and they are Army men—take pride in the fact that the Articles of War do have this ancient origin. They say truly, and take pride in saying, that probably there is no written law known to us, except portions of our Bill of Rights, that retains so closely the original language and its substance and system as our Articles of War.

Winthrop calls attention to that fact and comments on it as being a wonderful virtue. Now, of course, ordinarily the mere age of a system of law that can stand all these years, and stand satisfactorily and do justice, is evidence of its worth. But this is a penal code, a military penal code, and I think, prima facie, we are justified in looking askance at any penal code that has its origin in England in 1774 and centuries anterior to that time; and I think that in its military aspect we are also justified in looking askance, because we know that the armies of England and of the Continent of that day, from 1500 up to 1774, and even until recently, certainly can not be made to serve as patterns for an American Army of this day.

Senator CHAMBERLAIN. Why, in a general way?

Mr. ANSELL. In those days there was no such thing as popular control of an army. The people had nothing to do with the army. The army did not come from the people, and was not supported by the people. The army was, indeed, the enemy of popular rights. It was the strong arm of the ruler, king or emperor, by whatever name he might be called.

That was so in England even up to the time of our separation. The armies of those days were armies of feudal retainers. They were armies that belonged to the king. The men in them took, not oaths to support a constitution or the state generally, but oaths of personal fealty obligating them to the king and his military subordinates. They were mercenary armies. We know all this as historical fact. The king hired the men; he bought them and he paid for them, and he did with them as he pleased. Their obligation was not to the state; their obligation was not established and regulated by law or

popular will; it was an obligation of personal fealty or loyalty to this feudal superior.

Now, the result was that the king governed those men just as any overlord governed his retainers; more so, because there was no law whatever other than his will. The king was the commander in chief of this army, and he was more; he was the legislator for his army. He was the chief executive, the judge, the legislator, the executioner, the whole thing. The King of England, at the time of our separation, himself performed every duty for the army that the Constitution confers upon Congress. He, and he alone, made all the rules and regulations for the discipline of his army. He prescribed the law, the offense, and the penalty. He appointed the courts; and those courts appointed by him were his agents, or the agents of his under military officers. They were agencies to secure discipline according to the will of the king, or this military subordinate of the king. He told them what to do; he governed their proceedings. If he did not like what they did, then he either did it himself or, when the administration became so extensive that he could not exercise personal control, he did it through others.

The articles of war of 1774 and all antecedent British articles of war were not laws of Parliament. They were not expressions of popular will. They were not the result of common counsel. They were the King's articles of war. He made them. He prescribed what the courts should consist of; he prescribed the offenses; he prescribed the procedure; and without restraint applied such code to his officers and men.

Senator CHAMBERLAIN. After the adoption of those same articles of war under the Articles of Federation of the Continental Congress, to whom was that kingly power transferred in our system?

Mr. ANSELL. The executive power in those days was, of course, lodged in Congress, but as a practical matter the power was placed in the Commander in Chief, subject to the supervision of the Continental Congress. The Congress made just enough verbal change to make the system of Britain fit in with our Government as constituted.

But the point is, Congress itself did not legislate. Simply by adoption it took these British articles of war and turned them over to Gen. Washington and to his successors. And there we have them to this day—articles of war that were made by a king and for a king's army, in which he combined all the functions of government, for a set of mercenary soldiers. These same articles are in force in our Government to-day. When our Constitution came along we said, "We are not going to inherit over here any of the quarrel that they have had in all times past in England, indeed, in every country, between the people and the King as to who controls the Army. It is true we are going to make the President of the United States the commander of the Army, but we are going to subject that Army and its government to popular control, to the control of Congress."

I observe in the report that has just been gotten out by the Kernan Board, and which the press this morning quotes the Secretary of War as approving in toto, there are some 8½ of the 16 pages of the report devoted to arguing the proposition of law that the power to prescribe rules of discipline, the rules of government of

the Army, is not solely and exclusively in Congress, but that the Commander in Chief of the Army, under the Constitution, has inherited some of these ancient military prerogatives of the British Crown, the prerogative to make articles of war and to convene courts of his own. I say it with no disrespect, but from looking at the personnel of that board, nearly all of them professional military men—two Regular Army officers, one a National Guard officer who devotes most of his time to military service and but little of it, I imagine, to law—I judge that they really must come under the terms adopted by them to describe the right kind of army officer, "a man who knows much of the military and is a lawyer by a sort of courtesy."

If there is any one thing that seems to me to be established beyond all question and dispute, fundamentally fixed, it is that when the Constitution of the United States said that Congress shall have the power to make rules and regulations for the government of the Army, it conferred that power solely and exclusively upon the Congress. It never, so far as I know, has been disputed before. It would be a very distracting and disturbing state of affairs if it should be held at this late day, as these gentlemen so startlingly argue, that the President of the United States had inherited so much of this kingly prerogative over the Army of the United States that it is not within the power of Congress to create a court of review, whether of Army men or civilian judges, and that if you undertook to do so you would be depriving the President of the United States of some of his kingly prerogative over our Army. They announce that the President of the United States by inheritance has this prerogative power to convene courts-martial and give to such courts instructions, and it is not within the power of Congress to deny it to him.

But they say more, that Congress can not create this superior court-martial, to review the judgments of other courts-martial created by Congress; all deducible out of the fact that he was expressly made Commander-in-Chief of the Army by the Constitution, and all ignoring the fact that the same Constitution expressly and purposely took away from him the power to make rules and regulations for the government of the Army and conferred that power upon Congress.

Senator LENROOT. Do you know how the department reconciles that view, as set forth in its report, with its position with respect to the conclusiveness of courts-martial?

Mr. ANSELL. I was going to bring that up at a later time, Mr. Chairman. Inconsistency is the department's only virtue on this subject. The department held, you see, at the beginning of this war, that, in the absence of further legislation, there was no power on earth that could review the sentence of one of these courts-martial, and they said "this is not resident even in the President of the United States by virtue of any power, but is in Congress;" and they proposed a bill to Congress which I think it might be well for this committee to look at when it comes to take this question up for a more nearly final consideration. If the President had the power which the Kernan Board, with the approval of the Secretary of War, now finds he had, his neglect to use it is responsible for most of the injustice of this war.

Senator CHAMBERLAIN. It is a short bill. That is the bill of January, 1918?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. I wish you would have that inserted in the record at this point.

Mr. ANSELL. Very well.

(The bill referred to is here printed in the record, as follows:)

PROPOSED AMENDMENT OF SECTION 1199, REVISED STATUTES.

[The new matter is in italics.]

The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, *and report thereon to the President, who shall have power to disapprove, vacate, or set aside any finding, in whole or in part, to modify, vacate, or set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside. The President may suspend the execution of sentences in such classes of cases as may be designated by him until acted upon as herein provided, and may return any record through the reviewing authority to the court for reconsideration or correction. In addition to the duties herein enumerated to be performed by the Judge Advocate General, he shall* perform such other duties as have been heretofore performed by the Judge Advocate General of the Army.

(Following is the letter submitting said bill:)

WAR DEPARTMENT,
Washington, January 19, 1918.

Hon. GEORGE E. CHAMBERLAIN,
Chairman Senate Committee on Military Affairs.

MY DEAR SENATOR: I am inclosing herewith a draft of a proposed amendment of section 1199, Revised Statutes, which has my complete approval. I hope that it will likewise meet with the approval of your committee and that an opportunity may be found of securing its early enactment into law.

The general purpose of the proposed legislation is to vest in the President revisory powers in respect to sentences of courts-martial and other military tribunals. It has been the subject of thoughtful consideration by the Judge Advocate General, and in the light of the new conditions which now confront us. it is believed to be both wise and necessary.

The proposed amendment involves three propositions, viz, (*a*) vesting in the President the power to disapprove, modify, vacate, or set aside either in whole or in part any finding or sentence, and to direct the execution of such part of any sentence as has not been vacated or set aside; (*b*) the power to suspend execution of sentences in such classes of cases as he may designate until there has been opportunity to consider and act thereon; and (*c*) the power to return any trial record to the court through the reviewing authority for reconsideration or correction.

The first proposition finds its analogy in the civil courts, in the appellate power lodged in a supreme court. The second is a related power to suspend execution of a judgment pending appellate review, in order, when deemed advisable, to preserve the status quo. The third is to enlarge the power now exercised by the President so as to embrace cases coming to him for consideration under the provisions of the proposed amendment. At the present time the President exercises the power of returning to the court, through the reviewing authority, the record of any trial which has been forwarded to him for confirmation.

I believe that it would be wise public policy to lodge these powers in the President. He is the Commander in Chief of the Army, the supreme military authority, and bears to the Military Establishment and to the administration of military justice a relation analogous to that occupied by the Supreme Court in the structure of a civil judiciary. Upon him devolves the duty of securing efficiency and maintaining discipline in the military forces, and at the same time so to adjust the operation of the machinery of the military courts that, so far as possible, instances of injustice to the individual soldier will be reduced to a minimum.

The present Articles of War authorize any officer, competent to convene a general court-martial, to approve and carry into execution any sentence affecting an enlisted man, including noncommissioned officers, excepting the death sentence; and, in addition, the commanding general of a territorial department, or territorial division, or of any army in the field in time of war, as the present, may approve and carry into execution a sentence of death in certain enumerated cases, or the dismissal of an officer below the grade of brigadier general (arts. 46–48). In these cases no confirmation seems to be authorized or contemplated by the President, although the officer approving the sentence may, if he sees fit, suspend execution until the pleasure of the President is known (51st article of war). In these respects the present Articles of War do not differ essentially from the prior compilations of 1806 and 1874, although in 1862, during the Civil War, it was provided by independent legislation that a sentence of death, or of imprisonment in a penitentiary, should not be carried into execution until approved by the President. (Sec. 5, act of July 17, 1862, 12 Stat., 598.) The legislation which is now found in section 1199, Revised Statutes, originated in 1862 and thereafter went through sundry changes without affecting its essential characteristics. (Sec. 5, act of July 17, 1862, 12 Stat., 598; sec. 5, act of June 20, 1864, 13 Stat., 145.) Throughout the whole period that this legislation has been in effect it has been the practice for the Judge Advocate General of the Army to examine the records of trial by general courts-martial and other military courts primarily with the view of determining whether the proceedings were regular and valid, and to make report thereon through the Secretary of War to the President. During that whole time it has been the settled construction and practice of the War Department and its officers to regard as final and beyond appellate or corrective action the judgments of courts-martial when approved by the reviewing authority, except in cases where the proceedings were coram non judice or for other cause void ab initio. Thus it has been held by the Judge Advocate General in many cases that a sentence pronounced by a court-martial and approved by the proper convening authority, was final and could not be revoked or set aside by the President or by any department of the Government unless the court was without jurisdiction or the proceedings were invalid, and that relief could be had only through the exercise of the executive power to pardon.

We are now assembling a large Army. Our young men are being drawn from the homes of the Nation and placed in military service, both in the ranks and as offiecrs. A very large percentage of the officers of the new Army are of necessity drawn from civil life, and it is no reflection upon them to say that they have had little, if any opportunity to acquaint themselves with the history, usages, or principles of military law, or the practice of military tribunals.

In our new Army, more than ever before, it is not at all unlikely that sentences may be imposed by courts-martial and approved by the reviewing authorities which, if carried into execution, will work great injustice to the individual soldier. In practice and under existing legslation the trial records now come to the office of the Judge Advocate General for review. In that office cases may be examined with deliberation far removed from the immediate atmosphere of apparent military exigency. It is the purpose of the proposed legislation, when it appears, after such examination, that the substantial rights of the accused were disregarded upon the trial, or the evidence is insufficient, or an unnecessarily severe sentence has been imposed, or for other cause the sentence should be modified or set aside, to vest in the President clear statutory authority to disapprove, modify, vacate, or set aside any finding or sentence, in whole or in part. In order that he may have an opportunity to exercise this revisory power, it is proposed to give him authority to suspend execution of such sentences until opportunity has been had for review by the Judge Advocate General and a report thereon to him. With this power conferred and this practice established, a person found to have been erroneously convicted, or upon whom too severe a sentence has been imposed, may in the one case have his innocence adjudged, and in the other the proper sentence imposed, and not, as now, be remitted for relief to the pardoning power of the Executive, which leaves the question of guilt untouched and operates only by way of Executive clemency.

It will be noted that the proposed legislation authorizes the President to designate the classes of cases in which sentence shall be suspended until the case has been reviewed by the Judge Advocate General, and report made to the President. In a great majority of cases tried by courts-martial there will be no necessity for the application of the new legislation, for instance, special

and summary courts deal with minor military offenses. These courts have but a limited jurisdiction as to the sentences which may be imposed, and as to such sentences, it is believed that there is no good reason why final action may not be taken by the officer appointing the court. The classes of cases intended to be reached are those which involve a sentence of death, dishonorable discharge, or dismissal. By leaving to the President the power of designating the classes of cases in which execution of sentence may be suspended, pending his action thereon, the practice to be followed may be adjusted from time to time to meet changing conditions in the military situation.

Under the ninety-sixth article of war, courts-martial are given jurisdiction to try persons subject to military law for "all crimes or offenses not capital." Under this grant of jurisdiction persons in the military service are now frequently tried for the commission of civil crimes, and it is obvious that the trial of these offenses by military courts, unlearned in the law, adds an element of uncertainty as to the legality of the outcome, which serves forcibly to emphasize the need of the revisory powers herein suggested for the protection of persons accused of crime, and to safeguard the administration of military justice.

When the existing Articles of War were revised in 1916 there was introduced as new matter the thirty-eighth article of war, which authorizes the President to prescribe rules of procedure in cases before courts-martial and other military courts. Under this grant of power the President has promulgated certain rules of procedure suspending the execution of sentences of dishonorable discharge, death, and dismissal until the records of trial in such cases have been reviewed in the office of the Judge Advocate General, but it is clear, for the reasons heretofore pointed out, that the exercise of this power does not meet all the requirements of the situation. In order to place the whole matter where it will be beyond cavil or dispute, and by a clear grant of statutory power to vest in the President an authority which he should, beyond all question, be authorized to exercise, the legislation requested should be enacted into law, since its whole purpose is to protect the rights of men on trial, and to remove the possibility of being compelled to say in any case that an injustice has been done for which the statutes provide no clear or adequate remedy.

I am sure the Judge Advocate General will be glad to appear in person, or by representative, before your committee, should any further explanation of the proposed legislation be desired.

Very respectfully,

NEWTON D. BAKER,
Secretary of War.

Mr. ANSELL. There they come to Congress and ask Congress to confer out of its power, upon the President of the United States, whom they regard as the proper despository of this power if it is to be delegated to any military official or to anybody else, this revisory power; but in doing so I bid you take notice of the fact that they carry along up to this highest court, the President of the United States, the power that they insist all military commanders shall have, the power not simply to revise for an error of law, and modify and reverse—not that—but the power to set aside the finding of not guilty, an acquittal, and to substitute for it a conviction; the power to substitute a finding of a large offense for one of minor or lesser included degree and——

Senator CHAMBERLAIN. May I not interrupt you, General, because the history of it is so interesting to me that I think it ought to be embodied here, to speak of the motive which prompted the submission of those articles of war to the Senate of the United States?

Mr. ANSELL. Yes; just one more thing, if you will pardon me.

Senator CHAMBERLAIN. Yes.

Mr. ANSELL (continuing). And the power to strike down a smaller punishment and substitute for it a larger one.

Now, this is no more than what the subordinate military officials who convene general courts-martial have, and the power for which they have ever contended, so far as I know, up to this time, although there seem to be signs of awakening with respect to some of them.

If I may be permitted to say it—and I think I may because of my intense interest in this subject and because I think that this committee ought always to know the motives and purposes back of the submission of proposed legislation of this kind—I should like to say that I have never believed, and I have good reasons for not believing, that that bill was submitted to this body in good faith. That bill was drafted and submitted by the Judge Advocate General of the Army, through and with the approval of the Secretary of War. The question is, did the Judge Advocate General of the Army and the Secretary of War at that time want any revisory power? And really, do they want any now?

In the first place, if they had actually been desirous of discovering or locating this revisory power so that the judgments of courts-martial could have been kept within legal check, they would have given far better evidence of it by accepting that construction of the statute which, even if they regarded it as doubtful, they would have been justified in accepting to reach this desirable end, when the officer who was at that time the chief law officer of the Army, or acting as such by the authority of the War Department, had, upon most thorough consideration, written an office opinion to that effect, which had been concurred in by every single lawyer in that department, without the slightest imposition upon them by me. It could not have been, I say, so far wrong, conceding it to be disputable, which I do not concede, but that they could have accepted it and established this revisory power and thereby prevented what I conceive to be the grossest injustice, during this war. The Secretary of War now finds the President has such power constitutionally.

But, too, if it be thought that they had intended a real revisory power, the bill itself is evidence to the contrary. I can hardly conceive that anybody would submit such a bill as that to the Congress of the United States expecting it to pass upon thorough investigation, because few men in touch with the people of the United States, representatives of the people of the United States, would ever give their approval to a proposition that is so un-American, so basically illegal, and unjust and unfair, as to permit any man to strike down the judgment of a court to the disadvantage of the accused, substituting harsher punishment, harsher penalties, than the court awarded?

Analyzing that bill, let us see what kind of revision we would have gotten out of that bill. That bill would have had to be construed together with that section of the act of 1903 creating and defining the duties of the General Staff. It is all well and good to say, upon paper, that the President of the United States shall be this court of appeals, or whatever else it is to be called; but we know—any man who knows anything about this Government knows—that the President of the United States himself cannot perform such functions, first and largely because of the multiplicity and volume of his duties, and because of the crushing volume of work that would be brought to him by reason of such legislation.

Think of any President reviewing that number of criminal cases, which, with such review as we have given them, have taken 108 lawyers to review in the office of the Judge Advocate General! As a practical matter, the President of the United States could not perform the duties; he would not be expected to perform the duties. But as a matter of law he need not and would not, perform the duties because, construing the proposed legislation with legislation already existing, you would find that the Chief of Staff would be substituted for the President of the United States. By the General Staff act the Chief of Staff of the Army is the trusted adviser, upon all matters military, of the President of the United States and of the Secretary of War; and we know, and it has been held time and time again, that the Secretary of War is the constitutional mouthpiece of the President of the United States, and when he acts for the President of the United States there can be no inquiry into whether or not he has the actual authority. I invite your attention to the General Staff act. So much for the necessary delegation, and the delegation authorized by statute.

Senator CHAMBERLAIN. Let me interrupt you there for a moment to say that—we have it in the record—I introduced the bill in January, 1918, at the request of the Secretary of War, as the chairman of the Committee on Military Affairs, but our committee declined to consider it.

Mr. ANSELL. I so understand, and I think it is a good thing that it was never enacted into law, because it would have carried this iniquitous system one step further.

Senator LENROOT. Was that bill accompanied with any report from the Secretary?

Senator CHAMBERLAIN. It was, was it not?

Mr. ANSELL. There were letters with it; yes.

Senator CHAMBERLAIN. I think we might as well print that bill in this record, and if we can get the letters, put them in.

Senator LENROOT. If you can get the letters, put them in; yes.

The matter referred to, with an accompanying letter, will be found printed in this record at page 108.

Mr. ANSELL. I say if that bill had passed, or if any bill is passed, I wish to assure this committee, lodging this revisory power in the President of the United States, you might as well just say that it shall be lodged in the Chief of Staff of the Army.

Now, the bureaucrats of the Army were perturbed about this revisory power. When I wrote the opinion that these court-martial judgments should be revised, the ultramilitary bureau chiefs of the War Department came to the support of the existing system, as they have ever done, with the slogan that the relationship between courts-martial and the power of military command for the enforcement of discipline must be conceded; that the courts can not be independent of the military command; that the law of the courts is the will of the military commander, and is subject to his judgment and discretion and his command; that there is no other way of getting discipline, according to their sense and meaning of that word. Their slogan—the slogan of Judge Advocate General Crowder—was that the military law finds its fittest field of application in the military camp and by the military commander, without review or supervision. Probably

the great majority of the high ranking officers of the Military Establishment agree in this. Doubtless they are honest in that. They have heard it all their lives; they have been brought up under that system; they believe that discipline can not be regulated by law, but must be regulated by the will of the military commander; that justice as determined by the application of legal principles has no place in the Army, and that such justice as we have is the justice which appeals as such to the natural sense of justice of some military commander, modified by his view of what the exigency requires.

Contemporaneously with the submission of this bill to the Congress of the United States—both Houses of it—the Judge Advocate General of the Army, its author and proponent, dispatched to his senior Judge Advocate General in France upon the staff of Gen. Pershing a letter and placed it upon the files of the War Department, apologizing for or excusing the fact that he had had to get out this general order No. 7 which withheld the hand of the executioner until there could be a sort of revision in the department. In that letter he asked that the reasons be explained to Gen. Pershing. He said it was necessary that the War Department do something in deference to popular opinion; it was necessary that the War Department do something "to head off a congressional investigation;" it was necessary that the War Department do something, or before long Congress would be talking about creating an appellate court with revisory power, which was anathema to the Army; and lastly, that it was necessary that the War Department do something in order to have the man in the ranks believe that he was getting some kind of revision of his case other than that which takes place at field headquarters.

Senator CHAMBERLAIN. Will you get that letter and put it in the record there?

Mr. ANSELL. Yes, sir; I can do that.

(Thereupon, at 12.35 oclock p. m., the subcommittee adjourned until to-morrow, Tuesday, Aug. 26, 1919, at 10 o'clock a. m.)

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